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IN THE
Supreme Court of the United States
OCTOBER TERM, 1978

No. 78-1651

SEATRAN SHIPBUILDING CORPORATION, et al.,
Petitioners,

v.

SHELL OIL COMPANY, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

**BRIEF FOR THE RESPONDENTS
ALASKA BULK CARRIERS, INC.
AND TRINIDAD CORPORATION**

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STATUTES OR RULES INVOLVED

The relevant statutes in addition to the statutes and rule reprinted in the appendices of the brief for the petitioners and brief for the federal parties are set forth in the appendix, *infra*, 1a - 6a.

QUESTIONS PRESENTED

1. Whether the court of appeals had jurisdiction under Rule 54(b) of the Federal Rules of Civil Procedure, 28 U.S.C. § 1291, or 28 U.S.C. § 1292(a)(1), to review a district court order entered under Rule 54(b) which finally determined one claim for relief, denying permanent injunctive relief as to that claim; remanded for further administrative determination a second claim which, however determined, could not have afforded plaintiffs the full relief sought in the complaint; and dismissed the case.

2. Whether the Secretary of Commerce may permit a vessel built with construction-differential subsidy to serve permanently in the domestic trades, upon repayment of subsidy or upon any other conditions, where the statute expressly prohibits such service except for six months in any year.

3. Whether, if the answer to the second question is affirmative, the Secretary of Commerce has the authority to accept a promissory note in lieu of subsidy repayment, thereby making a loan of the subsidy originally paid, where the conditions under which the statute authorizes the Secretary to make loans for the construction of vessels have not been satisfied.

COUNTERSTATEMENT OF THE CASE

Respondent Alaska Bulk Carriers, Inc. (hereafter, "ABC") charters and operates three U.S. tankers, all built without construction-differential subsidy (hereafter, "CDS"). By design, the ships are suited to the carriage of oil from Alaska to the U.S. west coast or to transshipment facilities on the west coast of Panama. The vessels are too large for transit through the Panama Canal or for use in any other domestic trade. All of the vessels are used to carry oil from the trans-Alaska pipeline under a three year agreement with the Standard Oil Company (Ohio) (hereafter, "Sohio"), which ends in 1980. After 1980, two of the vessels will not be employed unless domestic charters are found. The management decision to build these three vessels was based on their use in the Alaskan oil trade (A. 86-87).

Respondent Trinidad Corporation (hereafter, "Trinidad"), a wholly owned subsidiary of Barber Oil Corporation, was formed in 1944 to operate and manage a fleet of U.S. flag tankers under charter to major oil companies. In 1976, in implementation of a plan by Trinidad's parent to become a major carrier of Alaskan crude oil, Trinidad purchased all the capital stock of Mathiasen's Tanker Industries, Inc. which held three large U.S. flag tankers under long-term charters, and contemporaneously purchased an interest in ABC. These acquisitions were financed through a multimillion-dollar bank loan. One of the three vessels which Trinidad acquired through purchase of Mathiasen's Tanker Industries, Inc. is currently subchartered to ABC. Trinidad is also the owner of five smaller U.S. flag tankers, four of which are under

transportation contracts with a major oil company (A. 82-83). None of the eight U.S. flag tankers owned or on long-term charter by Trinidad was built with CDS (A. 83).

In the late 1960s and again in the 1970s, the prospect of increased demand for large tankers to carry Alaskan oil to the U.S. encouraged the investment of private capital for unsubsidized tanker construction. Projections with respect to Alaska oil output and methods of delivery were continuously made both by investors and potential investors in delivery systems (A. 83-84) and by the Government in respect of its energy programs. Investors proceeded on the basis that tankers built with CDS, or under construction with CDS, were barred from the carriage of such oil other than for six months in any year (A. 83). The Government's development programs proceeded on the same basis. For example, an exhaustive study published in April, 1977, undertaken by the Federal Energy Administration at the request of Congress and entitled "Equitable Sharing of North Slope Crude Oil" (A. 190) stated, in discussing "Short-Term Delivery Systems Proposals" (A. 193, 235), and specifically delivery by tankers:

"Section 27 (the Jones Act) of the Merchant Marine Act of 1920 [46 U.S.C. § 883] requires that all marine trade between U.S. ports, whether coastwise or intercoastal, be strictly limited to U.S.-built and documented vessels owned by U.S. citizens. In addition to vessels engaged primarily or exclusively in this domestic trade, there are also U.S. flag vessels engaged in the U.S. foreign trade which satisfy the Jones Act requirements. Such foreign trade vessels clearly may be used in the domestic trade, unless they are *or have been* subsidized pursuant to the Merchant Marine Act of 1936.

The 1936 Act established two types of direct subsidy program: one for the operation of U.S. flag vessels in the foreign trade, and one for the construction of U.S. flag vessels for use in that trade. While not prohibiting the use of vessels subsidized under either program in the domestic trade, the statutory provisions of these programs do place some limitations on the transfer of subsidized vessels to the domestic trade, involving mainly suspension or repayment of subsidy. *U.S. flag ships which receive such construction differential subsidies ('CDS') and operating differential subsidies ('ODS') may be used in marine trade between U.S. ports only (1) for six months in any year, (2) upon condition that they repay a pro-rated portion of the construction subsidy and forego the operating subsidy, and (3) if the Secretary of Commerce makes a finding that such action will further the purposes of the 1936 Act.*" (A. 237-238) (emphasis supplied).¹

¹The study went on to indicate that inadequate tonnage in the eligible fleet was projected, and therefore the Maritime Administration of the Department of Commerce (hereafter, "the agency") intended to: "promulgate a proposed rulemaking to establish procedures for approving the transfer of CDS and ODS tankers to the domestic service, upon application. (Such promulgation may have occurred by the time this report is printed and distributed.)" (A. 238). The report stated that once these regulations were in effect, applications could be swiftly processed "and there need not, therefore, be any undue delays in obtaining authorizations for use of CDS and ODS tankers, if they are required" (A. 238). In fact, the regulations referred to were promulgated by the agency two months after the report was rendered, and provided that applications for use in the Alaskan oil trade of CDS-built vessels might be submitted to the agency. 46 C.F.R. Part 250. The regulations stated that no application would be approved "where the result would

Petitioner Seatrain Shipbuilding Corporation (hereafter, "Seatrain") says that in 1969 "when the projected international demand for tankers was rising and an imminent shortfall in tonnage was universally predicted," it commenced the construction of a series of Government subsidized supertankers intended for United States foreign commerce (Seatrain Brief, p. 7).² Seatrain says that by the time the STUYVESANT, built for foreign trade, was completed, in 1977, the foreign market had evaporated but the tanker market for Alaskan oil was good, whereupon an "attractive opportunity" presented itself to charter the STUYVESANT to carry Alaskan oil (Seatrain Brief, pp. 8-9). This recitation does not accurately describe Seatrain's intentions when it commenced building supertankers allegedly destined for U.S. foreign trade, or the state of industry knowledge at that time, or the "happenstance" of unanticipated opportunities in the Alaskan oil trade just as the STUYVESANT was nearing completion. The facts are that: (1) from the beginning, Seatrain was interested in the Alaskan oil trade; (2) it tried to "hedge" its "bet" on the foreign market by allowing for rededication of its supertankers, partially or fully, to the Alaskan oil trade if the market were to turn; (3) the Maritime Administration at

be to allow a vessel of the applicant to participate in the trade for a period exceeding six months in any consecutive 12-month period . . ." 46 C.F.R. § 250.5. See *infra*, pp 13 - 14.

²As hereafter used in this brief, statements such as "Seatrain says" or "Seatrain argues" will refer to assertions and arguments in the common brief submitted by Seatrain and its co-petitioner, Polk Tanker Corporation. References to "petitioners" will include Seatrain, Polk, and the Government, referring to the positions advanced by all parties seeking to overturn the decision of the court of appeals. References to "the Government" are directed to the brief submitted by the federal parties.

first rejected this plan and, indeed, predicted the turn of the market, considering a grant of CDS for Seatrain's supertankers inadvisable for that reason; but (4) the agency subsequently capitulated and granted CDS. Two internal memoranda of the Maritime Administration (A. 391, 404) reveal the real story.

The first memorandum, dated November 3, 1970, from the Deputy Maritime Administrator to the Deputy Undersecretary of Commerce on the subject of "SEATRIN SHIPBUILDING CORPORATION (Seatrain) - Construction Differential Subsidy (CDS) for 230,000 DWT Tankers" shows that Seatrain applied, in 1969, for mortgage and loan insurance, but *not* CDS, for two very large tankers to be used *in the Alaskan oil trade* (A. 391). Approximately one year later, in 1970, Seatrain applied for CDS to build two additional very large oil tankers for operation in the U.S. foreign trades (A. 392). After the filing of those applications, the principals of Seatrain indicated that they instead wanted CDS on the first two tankers rather than the last two. (Id.) The report states why:

"Apparently the reason for the 'switch' is the delay in the approval for the construction of the Trans-Alaska pipeline. Assuming the pipeline is built, most people feel that completion would not be before 1974-5 and that its capacity would not be reached until several years later. Hence, if the first two vessels were delivered on schedule in 1972 and 1973, there would be no profitable domestic employment for these vessels for at least several years. As a condition to the Title XI mortgage commitment Seatrain is required to

bareboat charter the ships for the first three years." A. 392.

The report considered in depth whether CDS should be granted for the building of these first two vessels for the foreign trade, and recommended that it should not. *First*, the report said that the amounts required would so cut into the agency's budget as to "seriously impair the Government's goal as mandated in the President's new Maritime Program in terms of the number of ships to be built...." (A. 394). *Second*, the report stated that the tankers were approximately twice as large as those considered most useful by the agency (A. 394-395). *Third*, the agency said that the vessels would have little national defense use because the Navy considered them "too deep, too wide, too long and too large" (A. 395). *Fourth*, the agency considered that Seatrain management and the Seatrain yard did not meet standards required for governmental assistance of this magnitude (A. 396-398).³ *Fifth*, the report questioned whether the foreign tanker market

³In prophetic words, the agency in 1970 said: "In view of the apparent diminishing need for additional shipyards, there is a serious question as to whether Marad should, through the payment of \$40 or more million [sic] in CDS, contribute to the start-up and renovation of an unproven shipyard which, at least to date, is committed to building ships for its parent to the exclusion of others, or support going facilities of proven worth. (A. 396) * * * Probably the most impelling consideration for Government assistance is the promise that jobs will be created for a large number of the hardcore unemployed and disadvantaged in the area adjacent to the shipyard. The degree to which this will eventually work out can only be conjectured. However, if the yard eventually fails to survive after we spend \$40,000,000 in CDS funds, the net result can only be that these people will have some limited and specialized training and temporary employment. These people will not find ready employment in the New York area because the ship repair business is limited in size and their training will not make them readily eligible for the highly unionized building trades. On the other hand, if the \$40,000,000 is spent in a shipyard with a high probability of survival, the investment in training will have a more permanent effect.

would support these two vessels scheduled for delivery in 1972-1973 (A. 399). *Sixth*, the report questioned whether the ships could be profitable (A. 400-401). *Seventh*, the report considered whether the ships, if not profitable for foreign trade, could be deployed in the domestic trade and answered that question negatively in these words:

"In accordance with Section 506 of the Act, Marad may consent to the transfer of a vessel built with CDS to other trades (domestic) for periods not exceeding six months in any year with the partial repayment of subsidy. *Therefore, the vessels could not operate exclusively in the domestic trade even with repayment of subsidy.*

There is a possibility that if Seatrain sold the vessels and repaid subsidy, the ships could operate in the domestic trade under the new owners. Such was the case with the Grace-Sealand containerships, however, said case was an unforeseen necessity *and not pre-arranged to circumvent the basic policies of the Act.*" (A. 401) (emphasis supplied).

The second memorandum was an interagency report from the Chief, Office of Subsidy Administration to the Maritime Administrator, undated but subsequent to November 3, 1970 (A. 403). The memorandum is a commentary on the Seatrain application for CDS for the building of the first two of the projected four tankers, and as such, recites and considers the arguments advanced by Seatrain in support of its application. The memorandum

Since almost all shipyards are near depressed areas the benefiting shipyards will also be training the disadvantaged." (A.397-398).

The New York Times of May 9, 1979, at A1. col.2, reported the closing of the Seatrain shipyard.

reveals that Seatrain tried to persuade the agency that the venture was profitable because the vessels could be diverted to the Alaskan trade, either for six months of each year, every year, or permanently and exclusively upon repayment of unamortized subsidy. The memorandum reflects disagreement with both of these Seatrain suggestions for such alternative use of vessels purportedly to be built with CDS for the foreign trade. Thus with respect to the idea that the vessels would serve in the Alaskan oil trade six months of each successive calendar year, the memorandum says: "We are opposed to the return of any vessel built with CDS to the domestic trade that is capable of the carriage of liquid bulk cargoes primarily for two reasons — namely (1) it is inconsistent with the basic policies of the Act, and (2) it presents unfair competition to existing and proposed domestic vessels built and operated without government subsidies." (A. 412-413). With respect to Seatrain's suggestion that "the tankers could be operated without restriction in the domestic trades upon repayment of the full unamortized portion of the CDS" (A. 414), the memorandum said:

"Neither section 506 nor any other provision of the Act relating to the CDS provides for releasing a CDS built ship from the domestic trade restrictions imposed by section 506 upon repayment of unamortized CDS." (A. 414).⁴

Despite these initial memoranda strongly recommending against the granting of CDS for even the first two of the projected four Seatrain supertankers, CDS was actually given for all *four* of the tankers, presumably for use in

⁴The memorandum then discussed the one instance in which the agency did release domestic trade restrictions, see *infra*, pp. 101-103, and concluded that such a release for Seatrain, if permissible, would not be warranted (A. 414-415).

foreign commerce, since the Act allows an application for CDS to be filed only "to aid in the construction of a new vessel to be used in the foreign commerce of the United States." Merchant Marine Act, section 501(a), 46 U.S.C. § 1151(a).⁵ The reasons for the agency change of position in granting Seatrain CDS for four supertankers, when it had initially recommended against CDS even for two, are not set forth in the record.

The STUYVESANT was the third vessel of this series.⁶ The contract for the building of the STUYVESANT was entered into on June 30, 1972 with a CDS award of \$27.2 million and a government guarantee of the construction loan in the maximum amount of \$30.2 million (A. 418). At the time of the award, in 1972, the vessel had no commitment for any employment.⁷ Construction of the STUYVESANT was halted in 1975 because a severe downturn in the demand for crude oil tankers in foreign trade made prospects of employment for this vessel, built on speculation, even more problematical than they were when the subsidy contract was awarded (A. 112). The halting of construction of the STUYVESANT — and of the last ship in the series, the BAY RIDGE — resulted in the virtual closing of the Seatrain yard. The Economic Development Administration (a sister agency of the Maritime Administration in the Department of Com-

⁵Indeed, Seatrain's affidavits to the courts below speak only of an intention "to enter the shipbuilding business at a time when the projected *international* demand for crude carriers was steadily rising. . . ." giving no hint that it had initially supported the economic viability of its proposal for CDS on the grounds of later diversion to the Alaskan oil trade (A. 111) (emphasis supplied).

⁶The first two vessels, the BROOKLYN and the WILLIAMSBURG, were long-term chartered in the U.S. foreign trade to American Petrofina, Inc. (A. 112).

⁷Pet. App. 9a.

merce) then determined to guarantee 90 percent of another \$40 million loan to Seatrain from private investors to reopen the yard (A. 113).⁸ Construction of the STUYVESANT then recommenced even though foreign trade prospects were still bleak. The vessel was completed in 1977 (A. 113).

Between 1970, when it first recommended against CDS assistance for any of the Seatrain supertankers — a recommendation based in large part on the commercial non-viability of the project, see *supra*, pp.8-10 — and 1977, when the STUYVESANT was completed, the agency also reversed field on its 1970 decision not to grant loan guarantees under Title XI of the Merchant Marine Act. That title permits the agency to guarantee loans of up to 75 percent of the cost of a CDS-built vessel upon a finding “that the property or project with respect to which the obligation will be executed will be, in [the Secretary’s] opinion, economically sound. . . .” Merchant Marine Act, section 1104(d), 46 U.S.C. § 1274(d). This finding is required to be made both “prior to the time such commitment [to guarantee an obligation] is made,” and “at or prior to the time the guarantee becomes effective. . . .” *Id.* In 1972 the agency had committed itself for \$30.2 million in loan guarantees for the STUYVESANT (A. 418).

When the STUYVESANT was completed in 1977, prospects for its use in foreign trade had not improved from the time that construction was recommenced in 1975.⁹ In 1977, however, Seatrain had already received:

⁸The Government (Government Brief, p. 7 n. 11) gives 42 U.S.C. § 1342 as the source of EDA aid to Seatrain. That section requires a determination of “reasonable assurance of repayment” and the implementing regulations require the submission of detailed information so that the necessary determination may be made. 13 C.F.R. § 306.9.

⁹Seatrain Brief, pp. 8-9.

- (1) \$27.2 million CDS for the STUYVESANT;
- (2) \$28.8 million CDS for the fourth tanker in the series, the BAY RIDGE;
- (3) a \$30.2 million guarantee of a construction loan for the STUYVESANT;
- (4) a \$34.5 million guarantee of a construction loan for the BAY RIDGE;
- (5) a \$5 million loan by the EDA; and
- (6) a \$73.8 million EDA guarantee of private loans for both vessels.¹⁰

Government commitments thus had escalated substantially despite the agency’s original analysis concluding that the purposes and policies of the Act (and, indeed, the policies for providing assistance under the Economic Development Administration, see *supra*, p. 12 n. 8, and A.397-398) would not be served by huge governmental aids for the Seatrain ventures. Thereupon came the first public signal that this CDS-built vessel (and presumably its sister ship, the BAY RIDGE) was to be used in domestic commerce in the Alaskan oil trade, and for periods exceeding six months in any year.

On July 8, 1977, petitioner Polk Tanker Corporation (hereafter, “Polk”) filed with the agency an application for a “three-year waiver” of the restrictions imposed by section 506 of the Merchant Marine Act, 1936, so that it could time-charter the STUYVESANT to Sohio for three years to carry oil from Alaska to the continental United States (Pet. App. 10a).¹¹ The application was received as a filing under 46 C.F.R. Part 250 — the regulations promulgated in June, 1977, presumably to implement the program referred to in the Federal Energy Administration

¹⁰Pet. App. 8a-9a and A. 418.

¹¹Seatrain’s affiant said that “serious” negotiations for this charter had commenced in December, 1976 (A. 113).

report on transport of Alaskan oil (*supra*, pp. 4-5 & n. 1) — regulations which allowed six-month use of CDS vessels in the Alaskan oil trade as a short-term supplement to the Jones Act fleet. The application was accompanied by a Seatrain memorandum arguing that a three-year waiver of the section 506 restrictions was permitted under section 207 of the Act (A. 18-33). Although the agency's regulations stated that applications for periods longer than six months would not be approved (46 C.F.R. § 250.5), the agency assigned the application a docket number, S-565, and published notice of its filing in the *Federal Register* on July 19, 1977 (42 Fed. Reg. 37229 (1977)) (Pet. App. 70a). There followed the submission of voluminous comments in opposition, by respondents and others, all directing the agency's attention to its lack of authority under section 506 to grant the waiver, and challenging the Seatrain rationale that section 207 of the Act provided the agency with sufficient authority to make the contemplated inroad upon the restrictions mandated by section 506 (Pet. App. 10a-11a).

While the application for a "three-year waiver" was pending, the agency held several *ex parte* meetings with petitioners (Pet. App. 11a) and eventually accepted a proposal submitted by Polk that the agency release the restrictions of the subsidy contract under which the STUYVESANT was constructed, thereby permitting operation of the vessel in the otherwise prohibited domestic trades, upon Polk's execution of a 20-year promissory note (payable in 40 semiannual installments) for the amount of \$27.2 million CDS (*Id.*). The agency did not notice this new proposal in the *Federal Register*, but instead confirmed its approval of Polk's proposal by two letters to Polk, both dated August 31, 1977 (*Id.*). One of the letters and a press release subsequently issued by the agency stated that approval of the Polk proposal was given because the con-

tinued operation of Seatrain was in jeopardy, which in turn meant that it might default on its obligations to the various agencies of the Department of Commerce (A. 34).

The financial transactions contemplated by the approvals of August 31 were the issuance of \$60.2 million of government-guaranteed indebtedness on the STUYVESANT, of which \$31.3 million would be indebtedness incurred through the sale of bonds; \$28 million of that \$31.3 million would be used to repay part of the outstanding loans guaranteed by the Economic Development Administration (Pet. App. 71a).¹² Seatrain's "repayment" of the \$27.2 million CDS was to be by promissory note payable over 20 years in equal semiannual installments, the security for which was a *third* mortgage on the STUYVESANT which was to be subject to two prior mortgages issued as security for the \$60.2 million of government-guaranteed indebtedness on the loan (A. 68, 72).

On September 22, 1977, respondents ABC and Trinidad and respondent Shell Oil Company (hereafter, "Shell") filed a complaint seeking district court review of the agency's actions and moved for temporary and preliminary injunctive relief, principally on the grounds that section 506 of the Act barred the permanent operation of a CDS-built vessel in the domestic trade. Affidavits submitted in support of this complaint showed the total disruption to the market that occurs because of the agency's actions lifting

¹²To commit itself to the new guarantees, the agency issued a finding, required under section 1104(d) of the Act, "that the property or project with respect to which the additional guaranteed obligations would be issued remains, in the [agency's opinion], economically sound" (A. 40), despite the fact that the only employment for this vessel referred to in these approvals was the three-year charter to Sohio (A. 35).

the section 506 bar. The complaint and the affidavits explored in detail the consequence of these actions; the instant devaluation of 29 vessels suitable for the Alaskan trade which were built without subsidy (A. 89-90); the possible entry of approximately 5,000,000 aggregate deadweight tonnage represented by CDS-built tankers which might similarly be waived into the Jones Act tanker fleet which had an aggregate deadweight tonnage of 9,500,000 (A. 84, A. 89-91); the difficulties which ABC and Trinidad would have in securing employment for their existing tankers beyond short-term charters due to expire in 1979-1981 (A. 84, A. 91); and the competitive injury to these companies of permitting vessels built with CDS for the foreign trade to come into the domestic trade several years after construction, during a period of rising construction costs. (A. 92-93).¹³ The complaints and affidavits spoke of the "adverse financial impact on the assets and operations of [plaintiffs] and other companies similarly situated" (A. 85) and the inevitable inhibition on investment in unsubsidized tonnage for the domestic fleet (A. 91-93). A temporary restraining order was issued on September 22, 1977; preliminary injunctive relief was denied on September 30, 1977, principally on the ground that plaintiffs had failed to show immediate irreparable injury (Pet. App. 12a). Following the denial of the motion for preliminary injunction, the transactions involving the STUYVESANT were "closed" (*Id.*).¹⁴

¹³In the four years between July, 1973 and July, 1977, shipbuilding labor costs rose 40 percent and material costs 58 percent. A subsidized ship built in 1973 would be available at a base cost 50 percent below that of an unsubsidized ship built four years later, *over and above differences in costs reflected by the amount of subsidy* (A. 88).

¹⁴In denying the preliminary injunction, the district court judge issued the following caveat:

"These business entities that are not now before the Court, who, allegedly, and according to the representa-

Discovery proceeded on an expedited schedule and the parties filed cross-motions for summary judgment (Pet. App. 12a). On November 22, 1977 the trial court issued an opinion (Pet. App. 65a-95a) and order (A. 556-557) which (1) granted the motions of ABC, Trinidad, and Shell for summary judgment on the issue of whether the waiver for the STUYVESANT had been granted without any consideration of the competitive effects thereof, and was therefore in violation of the Administrative Procedure Act,¹⁵ remanding the case to the agency for such consideration; (2) denied the motions of ABC, Trinidad, and Shell for summary judgment and injunctive relief on the issue of whether section 506 of the Act barred the agency from ever lifting the bar against permanent operations by any CDS-built vessel in the domestic trades, and granted the agency's and petitioners' motions for summary judgment on that issue; and (3) denied the agency's and petitioners' motions for summary judgment on another claim of procedural irregularity and retained that issue for disposition by the court (Pet. App. 94a-95a). By further order entered on November 30, 1977, the trial court dismissed the remaining pending claim¹⁶ and entered final

tions of counsel, are going to close on a very substantial and multimillion-dollar transaction today, may find out later, upon further consideration of the law and the merits, that such transaction was not proper, was illegal, or arbitrary and capricious; and, thus, they may have certain problems." Record of the district court, as certified to the court of appeals for the appellate review docketed as No. 78-1281 (R. 57 p. 10).

¹⁵The trial court held that the protection of unsubsidized vessels from unfair competition by subsidized vessels was "one of the cornerstones of the statutory scheme" (Pet. App. 92a).

¹⁶The trial court found that the additional claim "that the Secretary's decisions with respect to the STUYVESANT were arbitrary, capricious, and an abuse of discretion because the operative decisions were made in 1975 and kept secret until 1977 . . ." was "superfluous and would afford plaintiffs no greater relief than the remand which has already been ordered by this Court. . . ." (A. 558)

judgment with respect to all claims decided by the court (A. 558-559).

Appeals from the trial court's decision were filed in the United States Court of Appeals for the District of Columbia Circuit, and the court of appeals rendered its decision on February 6, 1979 (Pet. App. 2a). The court of appeals reversed the trial court's decision, holding that the agency's actions were barred by section 506 of the Merchant Marine Act, 1936. (Pet. App. 51a). A dissenting opinion, filed by Judge Bazelon, would have sustained the judgment of the trial court (Pet. App. 60a-61a). Seatrain and the agency petitioned for rehearing with a suggestion for rehearing *en banc*; these petitions were denied, the latter by the full court,¹⁷ with Judge Bazelon noted as in favor of granting both petitions (Pet. App. 62a-64a).

On March 20, 1979, Seatrain and the agency filed with the court of appeals a petition for a stay of the mandate pending application to this Court for a writ of certiorari. That motion was granted on April 19, 1979 but the stay was ordered only until May 1, 1979. The petition herein having been filed on April 30, 1979, the stay is still in effect, and the STUYVESANT continues to operate in the domestic trade, as it has since October, 1977.

SUMMARY OF ARGUMENT

The court of appeals held that section 506 of the Merchant Marine Act, 1936, prohibits the entry of a vessel built for United States foreign commerce with the aid of construction-differential subsidy into domestic commerce

¹⁷The original order denying the suggestion for rehearing *en banc* filed March 22, 1979, shows consideration by the entire court, with only Judge Bazelon recorded as in favor of a rehearing *en banc* (Pet. App. 63a-64a). An amendment to that order was filed showing that Judge Levanthal did not participate in the decision on the suggestion for rehearing *en banc* (A. 602).

for periods longer than six months in any year. Consequently, the court of appeals reversed a district court order which had denied plaintiffs' request for declaratory and injunctive relief against the waiver by the Secretary of Commerce of the section 506 bar, and dismissed the case. The court of appeals had jurisdiction to review that order and its decision was correct.

I

A. The order appealed from was reviewable under Rule 54(b) of the Federal Rules of Civil Procedure because it finally disposed of one or more but less than all of the claims for relief. The remand ordered by the district court, pertaining only to the "competitive effect" of the STUYVESANT upon respondents and others, did not detract from the finality of the decision rendered, because the complaint sought more than the barring of the STUYVESANT from the Alaskan oil trade. No proceedings on remand could have affected the judgment of the district court which finally decided, adversely to plaintiffs ABC and Trinidad, that they were not entitled to two of the four prayers for relief requested in the complaint. The Government construction of the complaint as requesting an injunction going only to the exercise of the claimed power with respect to the STUYVESANT is not supportable, and the Government contention that an order may not be entered under Rule 54(b) where the issues decided and those remaining are factually inter-related has been decided adversely to the Government by this Court in *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427 (1956).

B. Even if the complaint had sought only an injunction against the operation of the STUYVESANT, the order appealed from would be final under 28 U.S.C. §1291 because plaintiffs might otherwise be barred from obtaining appellate review of the principal issue of agency authority

which was decided in the order encompassing the remand. If, for example, the decision on remand, or a subsequent district court review of that decision, ultimately determined that the STUYVESANT should be barred because of "competitive effect," the Secretarial power to waive the statutory bar could be exercised at a later time for that vessel (or others) under the unreviewed order of the district court. Moreover, even if the remand proceeding culminated in a decision sustaining Secretarial exercise of the waiver power, thus providing an opportunity for eventual appellate review, the issue of agency authority would not be encompassed within such review. All of the facts and arguments relating to that issue were contained in the case which stood dismissed by the November 30, 1977 order. A review of the Secretary's decision on remand would not relate to the issue of Secretarial authority, and the record on review of that new decision would be barren of all of the facts and arguments relating to the existence of the disputed waiver authority. The order was therefore final, within the meaning of 28 U.S.C. §1291, even if, *arguendo*, the complaint had only one claim for relief.

C. Even if the order appealed from was not final under Rule 54(b) or 28 U.S.C. §1291, it was properly appealable under 28 U.S.C. § 1292(a)(1) as a final order denying injunctive relief. 28 U.S.C. §1292(a)(1) has been uniformly interpreted as conferring jurisdiction upon courts of appeals to consider appeals from denials of requests for permanent, as well as preliminary, injunctions. The Government contention that no injunction was finally denied because of the possibility of a Secretarial decision on remand barring the STUYVESANT again misreads the complaint as seeking an injunction barring only that vessel, rather than an injunction against any exercise of the disputed waiver authority.

II

The Merchant Marine Act, 1936, authorizes the agency to award construction-differential subsidy (CDS) in order to equalize the costs of building vessels in U.S. shipyards with the lower foreign costs of construction. CDS is available only for vessels intended to serve U.S. foreign commerce, and such vessels may, in the course of such foreign service, carry cargoes between four enumerated U.S. trades, referred to herein as incidental domestic trades. No CDS is allowed for building vessels intended for purely domestic commerce for the reason that only U.S.-built vessels can carry cargo in those trades under the Jones Act, 46 U.S.C. §883. Vessels built for Jones Act trades charge higher freight rates than vessels built for foreign trades because of higher construction (and operating) costs in U.S. domestic commerce compared to U.S. foreign commerce, and the Jones Act fleet consequently is not competitive with the subsidized fleet. The Merchant Marine Act protects the Jones Act fleet from competition with vessels built with subsidy by a specific provision, section 506 of the Act, mandating that every owner of a vessel built with subsidy must use the vessel in foreign or incidental domestic trades with one exception: such vessels may serve Jones Act trades upon receiving the agency's consent, but such consent is limited to six months in any year. There is no provision in the Merchant Marine Acts which permits the building of vessels with CDS with the option, at any later time, of redeploying the vessel in Jones Act trades upon a commitment to pay back all or any portion of that subsidy.

Section 506 addresses the entire universe of the permissible uses for CDS-built vessels and also sets forth the exceptions for such uses. When a statute sets forth the exceptions to a prohibition, other exceptions may not be implied. The statute is so plain and unambiguous on its face

that there is no need to alter the plain meaning of the language by resort to "aids of statutory construction" which are used to determine the intent of Congress when a statute is ambiguous. Petitioners' entire argument rests not upon the language of the statute, but on an attempt to vary the plain language by resort to those aids.

Nonetheless, examination of relevant legislative history conclusively confirms the interpretation of the statute that is conveyed by its language. While the statute, as originally enacted in 1936, might have permitted the action taken by the agency here, it was amended in 1938 to delete the only language which could conceivably have permitted a permanent waiver of the bar against entry of subsidized vessels into the domestic trades upon repayment of subsidy. The legislative history clearly shows that the deletion was purposeful, and was done at the request of the agency which thought that the only permissible incursion by subsidized vessels into Jones Act trades ought to be one entry limited to six months in any year. Petitioners reliance on debates in, and proposed but unenacted legislation of, later Congresses to show a contrary interpretation of the 1938 amendment is legally infirm, *International Bhd. of Teamsters v. U.S.*, 431 U.S. 324 (1977); moreover, the legislative materials cited do not even support petitioners' point. On the other hand, statutes actually enacted by later Congresses show a congressional recognition that the section 506 bar can be lifted only by congressional, not administrative, action.

No other sections of the Act empower the Secretary to waive the bar imposed by section 506. Section 207, cited by petitioners as the source for this authority, confers corporate, not governmental powers; and section 504, also cited by petitioners, mandates respect for the bar imposed by section 506.

No deference to the views of the agency in interpreting its statute is required in this case. Assuming, *arguendo*, the statute were ambiguous or could be made ambiguous by resort to the legislative history cited by petitioners, the agency has met none of the threshold requirements for receiving judicial deference to its views. The agency's interpretation of the statute was not invoked at the time of taking the actions here complained of; it was not articulated, much less well-reasoned. The first time the agency ever interpreted the statute to confer administrative power to waive the section 506 bar was 26 years after its enactment, in a matter not judicially tested (the Grace Line action). This is only the second time that interpretation has ever been triggered. Moreover, the statutory interpretation given the first time was repudiated here: for the Grace Line vessels, the agency said the waiver authority was conferred by section 506, whereas here, it urges that section 506 is neutral on the question.

Although there is no consistent interpretation of the statute supporting the actions here taken, there is much inconsistent agency interpretation. Regulations of the agency specifically issued to remedy any temporary imbalance in the Alaskan oil trade limit the entry of CDS-built vessels into that trade to six months. The agency has contracted with its subsidy recipients to bar any subsequent owner of a CDS-built vessel from serving domestic trades other than in compliance with section 506. The agency, internally, has in the past rejected suggestions that the section 506 bar may be waived upon repayment of unamortized subsidy.

The statutory interpretation urged here by the agency is a *post hoc* rationalization to protect the government from the consequences of having guaranteed loans to private ventures which are now in trouble, and this was the precise reason given for the waiver when the actions complained of were taken. A proper balancing of the roles of the legislative and executive branches does not require judicial deference to agency interpretations in such circumstances.

III

Even if, *arguendo*, section 506 did not bar the permanent entry of vessels built with CDS into the domestic trades, the actions taken by the agency were unlawful because the acceptance of a promissory note, payable over 20 years as "repayment" of the subsidy, was an unauthorized loan from the Government to a private party. The only loan authority of the agency is found in section 509 of the Act which was not applicable, by its terms, to acceptance of the repayment of subsidy for vessels built for foreign trades. In the one other instance, the Grace Line action, in which the agency waived the section 506 bar, the agency expressly disclaimed the power to accept repayment over time. Under petitioners' own theory that a vessel which continues to enjoy the benefits of subsidy may not ply the Jones Act trades, the loan arrangement was unlawful. In any event, it was unlawful as an unauthorized payment from the United States treasury. *Reeside v. Walker*, 11 How. 272 (1851); *United States v. MacCollom*, 426 U.S. 317 (1976).

IV

The broad purposes and policies of the Merchant Marine Acts are to foster the development of a U.S. Merchant Marine capable of carrying United States commerce and serving the nation's needs in times of war or national emergency. Achievement of those objectives requires certainty about the Government's role in respect of all the components of the industry. The investments required are large; markets are volatile; economic forces are unpredictable. If the Merchant Marine Act, 1936, is now interpreted to permit the "waiver" of vessels built with subsidy into the domestic trades, the basis upon which huge sums from private enterprise have been invested to build vessels for domestic trades will be destroyed.

Decisions to invest in vessel construction require as much certainty as possible about future prospects, particularly given the long lead time required for construction. Such decisions have been made, in the past, upon the understanding that vessels built or to be built with subsidy are ineligible for permanent operation in domestic trades. Given the necessary lead years of construction and the volatility of the business market, the entry upon "waiver" of huge subsidized tonnage built in less inflationary times would severely inhibit the growth and development of the Jones Act fleet. The fundamental purposes of the Merchant Marine Acts would be sabotaged.

Adoption of petitioners' theories ineluctably leads to a melding of the Jones Act and subsidized fleets. If the only condition for permanent entry into Jones Act trades is the repayment of unamortized subsidy, all of the subsidized tonnage becomes waivable into Jones Act trades depending upon the Secretary's perceived need to protect government loan guarantees of vessels, guarantees which extend over the vessels' economic lives. If, as claimed, section 506 is neutral on the issue of whether vessels may be rededicated to the domestic trades provided only that "unamortized" subsidy is repaid, ships might go back and forth from Jones Act to subsidized fleets as markets change. The statutory bar against entry into domestic trades for periods not exceeding six months is not reconcilable with the broad discretion theory urged here by petitioners.

The issue of proper demarcation between the Jones Act and subsidized fleets is one that has been addressed by the Congress. If the boundaries are unwisely marked by section 506, the statute should be amended. Congress, not the executive, should legislate in this area, particularly where the impartiality of the executive branch is imperiled by the consequences of having committed itself to an imprudent

business venture. Only the Congress can fairly evaluate the needs of the Jones Act fleet and the subsidized fleet for protection and encouragement.

Petitioners' suggestions that the result they seek is needed to promote competition or prohibit monopoly, or to serve the national energy needs, ring false and hollow. There is no evidence for the proposition that respondents have monopolized the Alaskan trade. Fair competition is not enhanced by allowing some tanker operators in the Alaskan trade to have received Government aid unavailable to others. There is no way in which the competitive position of respondents can be equalized with that of Seatrain, where Seatrain received Government monies not available to respondents, and, moreover, has 20 years to repay those monies. The record does not support petitioners' rationalization that the agency actions are needed for reasons pertaining to national energy needs, and the actions were not taken for that purpose.

Construction-differential subsidy is designed to promote United States foreign commerce. Neither the objective of promoting the purposes of the Merchant Marine Act nor the goal of preserving the proper balance between the legislative and executive branches is furthered by permitting the agency to accomplish what Congress has refused to permit: the permanent dedication of vessels built with CDS to the domestic trades. Petitioners' predicament should not obscure these vastly more important long-range objectives.

ARGUMENT

1. THE COURT OF APPEALS HAD JURISDICTION TO REVIEW THE DECISION AND ORDER OF THE DISTRICT COURT.

A. The Order Appealed From Was Final And Appealable Under Rule 54(b) Of The Federal Rules of Civil Procedure.

The Government contends that the district court's November 30, 1977 entry of judgment, which it admits was intended to be a final judgment on one or more but less than all of the claims presented pursuant to Rule 54(b) of the Federal Rules of Civil Procedure,¹⁸ was improperly entered and the court of appeals therefore lacked jurisdiction over the subsequent appeals. Citing this Court's recent decisions in *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978) and *Liberty Mutual Insurance Co. v. Wetzel*, 424 U.S. 737 (1976), the Government argues that such certification undermined the well-established policy against piecemeal appeals, because the remand ordered by the District Court would provide plaintiffs either (a) full relief, by prevailing in the remand proceeding, or (b) subsequent full judicial review, by appeal of a remand decision unfavorable to plaintiffs.

¹⁸The District Court made the specific findings required by Rule 54(b), namely that "no further issues remain before the Court and that there is no need for any further proceedings in this case at this time, and it further appearing that there is no reason to delay the entry of final judgment herein, it is, by the Court, this 30th day of November, 1977 . . . FURTHER ORDERED, that final judgment be, and the same hereby is, entered with respect to all claims decided by the Court in its Order and Memorandum Opinion of November 22, 1977" (A. 558-559), thus signaling that the order was appealable under Rule 54(b). Plaintiffs were put on notice that it was time to take an appeal. C. WRIGHT, *Law of Federal Courts*, §101 at 506 (3d ed. 1976).

That the Government's entire argument on finality is based upon the contention that plaintiffs' complaint sought a bar *only* for the STUYVESANT is clear: "Plaintiffs' complaint asserted only one claim or cause of action arising out of one set of facts: that the Secretary could not lawfully permit the STUYVESANT to sail in the Alaskan trade for more than six months per year." (Government Brief, p. 41).¹⁹ From this premise, the Government construes plaintiffs' complaints as proffering two alternative legal theories upon which to find a prohibition of permanent domestic trading for the STUYVESANT: (1) the Secretary had no power to waive the section 506 bar; and (2) the Secretary should not have waived the section 506 bar because of the STUYVESANT's competitive effect on plaintiff (Government Brief, pp. 41-42). Reasoning that the second theory was preserved by the remand, the Government concludes that there was no final disposition of any claim by the District Court order of November 30, 1977 (Government Brief, pp. 42-43).

The critical flaw in this argument is that this is not the complaint which was filed. ABC and Trinidad did not seek *only* an injunction against the permanent operation of the STUYVESANT in the domestic trades; rather ABC and

¹⁹The theme that an injunction against the STUYVESANT was *all* that plaintiffs sought is repeated throughout the Government's argument, e.g., "Rather, if they [the plaintiffs] could have convinced the Secretary on remand that the STUYVESANT transaction was improper because of its economic effects or, failing that, could have demonstrated to the district court on review of the decision on remand that the Secretary had abused her discretion or had acted arbitrarily, plaintiffs would have had no cause to complain, and no reason to appeal to the court of appeals." (Government Brief, p. 28). "If, on the other hand, the Secretary on remand had concluded that it was inappropriate to allow the STUYVESANT to operate in the Alaskan trade, there would have been no need for plaintiffs to appeal at all." (Government Brief, p. 36).

Trinidad sought a declaratory order that the agency lacked the statutory power to waive the bar against permanent operation of *any and all* vessels built with CDS in the domestic trades, and an injunction against *any* agency exercise of that claimed power. Admittedly, if plaintiffs had prevailed on this broad claim, the agency's actions with respect to the STUYVESANT would have been judicially invalidated. On the other hand, an injunction going only to the *exercise* of that power in respect of the STUYVESANT would not have afforded plaintiffs all of the relief sought. The only relief that plaintiffs could have enjoyed from the remand ordered by the district court would be an invalidation of the agency's waiver of the bar for the STUYVESANT.²⁰

In no way did ABC and Trinidad complain only of the actions taken with respect to the STUYVESANT. The complaint alleged that the agency was intending to make "similar arrangements" to lift restrictions on the BAY RIDGE (§ 33, A. 57), a sister ship to the STUYVESANT and under construction; the complaint alleged that lifting of the bar for *any* vessel built with CDS so as to allow permanent operation in the domestic trades was unlawful and defeated the purposes of the statute (§ 42, A. 61-62); and the complaint alleged that ABC and Trinidad, shipowners who had paid the full cost of U.S.-built tankers and had not received federal subsidy, would be subject to the unfair and unlawful competition from the STUYVESANT

²⁰The district court's decision ordered the agency to consider only the competitive effects upon plaintiffs of the exercise of that authority in respect of the waiver for the STUYVESANT because the district court held that the agency's failure to consider and weigh such effects violated the Administrative Procedure Act (Pet. App. 93a-94a). The issue of the Secretary's authority, however, was judicially settled, and could not have been reargued before the agency in the remand proceeding.

"and from other CDS-built vessels with respect to which vessels the agency may likewise lift operating restrictions if this action is permitted to stand." (§ 41, A. 61). The same paragraph and the ensuing paragraph of the complaint speak of the unfairness to plaintiffs, who had made the economic decision to invest in ships built in U.S. shipyards without subsidy, relying on supply and demand of the domestic market, being subject to unforeseen and immeasurable competition from vessels now in operation having been built with subsidy, and to the disruption of the market, both in respect of meeting financial commitments previously undertaken and in planning for additional investment, because of the new agency position that it possessed the power permanently to waive the bar. (A. 61-62, and see *supra*, pp. 3-4). Two of the four requests for relief requested a declaratory judgment and an injunction against lifting the statutory bar against permanent operation in the domestic trades for any or all vessels built with CDS, and were in no way limited to seeking a determination that only the STUYVESANT was so barred (A. 62-63).²¹ *The affidavits submitted on behalf of ABC and Trinidad complained not only of the effect on these plaintiffs of lifting the bar for the STUYVESANT, but also and more especially of the effect on plaintiffs of the*

²¹There were four counts in the ABC/Trinidad prayer for relief. The first asked for a permanent injunction against the agency from taking steps to carry out its actions releasing the STUYVESANT from the statutory bar; the second asked for a declaratory order that the agency lacks authority to waive the restrictions of section 506 "so as to permit the operation of vessels built with construction differential subsidy in domestic commerce either on condition of repayment of unamortized subsidy or otherwise (except on a temporary basis for less than six months in any year);" the third asked for a permanent injunction against the agency from amending *any* CDS contracts or taking other actions permitting such operations for any CDS-built vessels; and the fourth asked for such other relief as the Court may deem appropriate. (A. 62-63).

*agency position, made explicit by its actions in respect of the STUYVESANT, that it possessed the disputed authority which might be exercised at any time, thus undermining both plaintiffs present and planned commitments to the Alaskan oil trade (A. 83-84 & A. 87-91).*²²

The Government's failure to understand or recognize that the complaint sought not only the barring of the STUYVESANT, but also a declaratory judgment and injunction against the lifting of the bar for any CDS-built vessel, undermines its entire argument as to lack of finality. Almost all of the cases cited by the Government discuss the finality issue in a context wherein there was no Rule 54(b) issue or certification, *e.g.*, *Boston & Maine Railroad v. United States*, 358 U.S. 68 (1958), and cases cited at pp. 26 and 29 of the Government Brief, and throughout the Government's discussion of 28 U.S.C. 1291. The only Rule 54(b) cases cited by the Government are (1) those in the *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427 (1956) line, holding district court determinations of eligibility for Rule 54(b) treatment not binding on appellate courts, and (2) *Liberty Mutual Insurance Company v. Wetzel*, *supra*, 424 U.S. 737. The *Sears* principal is not disputed here; we concede that the district court had to be correct that one of less than all claims was finally decided by the order of November 30; we argue that a reading of the complaint leads to no other conclusion.

Liberty Mutual is not apposite. While *Liberty Mutual* did consider the application of Rule 54(b), it did so in a context wherein the merits of the action had been decided

²²Indeed, the disruption to the market and the unforeseen consequences of the claimed existence of this agency power were relied on by the court of appeals in holding that Congress did not intend the agency to have the authority claimed (Pet. App. 49a-51a).

in plaintiff's favor, but the district court had not yet determined whether to grant *any* of the relief requested by plaintiffs at the time it purported to issue a Rule 54(b) order. The plaintiffs had sought injunctive relief, damages, costs, and attorneys' fees for violations of Title VII of the Civil Rights Act of 1964. The district court had found in plaintiff's favor on the issue of violation, and had purported to issue a Rule 54(b) order on that issue, but had determined to withhold relief pending further proceedings. Holding that such an order "finally disposed of none of the respondents' prayers for relief" (424 U.S. at 742), this Court held that the order was not a final order under Rule 54(b). In this case, the November 30, 1977 order finally disposed of two specific prayers for relief.

The only other point made in the Government's short discussion of Rule 54(b) is that the case is not appealable as an interlocutory order under 28 U.S.C. § 1292(b), again citing *Liberty Mutual*, because the judge failed to state the three required findings. But reviewability is not predicated here on 1292(b); this Court considered that section in *Liberty Mutual* as an alternative ground for jurisdiction only after it had determined that *no* claim for relief was finally decided by the order from which appeal was taken. 424 U.S. at 744-745.

Indeed, the only arguments relevant to the issue of finality when the complaint is read for what it says is the Government's footnote suggestion (Government Brief, p. 31 n. 31), that a request for "relief against future STUYVESANT-type transactions would not have been justiciable under Article III of the Constitution." But while the "case or controversy" requirement of Article III limits the jurisdiction of federal courts to disputes of a definite and concrete nature, *Aetna Life Ins. Co. v.*

Haworth, 300 U.S. 227, 240-241 (1937),²³ application of that requirement does not preclude resolution of a dispute concerning the powers of an administrative agency where, as here, that resolution has a pervasive impact upon plaintiffs and the issue is tendered in a concrete posture.

In the landmark case of *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), this Court held that before accepting jurisdiction under the Declaratory Judgments Act, 28 U.S. § 2201-2202, a court must be satisfied that the issues tendered are fit for judicial decision and that withholding such decision would work a hardship upon the parties. 387 U.S. at 149. In *Abbott Laboratories*, as here, "the issue tendered is purely a legal one: whether the statute was properly construed by the [agency] . . ." *Id.* Noting that the agency interpretation of its powers was neither "informal," nor "tentative," nor an expression by a subordinate official, this Court in *Abbott Laboratories* found no constitutional bar to a judicial determination of the limits of agency powers.

Not only is this case identical with *Abbott Laboratories* in that the issue tendered for judicial resolution is the

²³Mr. Chief Justice Hughes' explanation of the "case or controversy" requirement in *Haworth* remains the classic definition:

"The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. . . It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. Where there is such a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function may be appropriately exercised. . ." 300 U.S. at 240-241 (citations omitted).

scope of a congressional delegation of power, but here, unlike *Abbott Laboratories*, that power has actually been exercised. To suggest, as does the Government, that one may tender for judicial resolution the existence of agency power only after the particular exercise of that power has been judicially sustained is to betray an ivory-tower understanding of the manner in which builders and charterers of supertankers make their business commitments. The courts have not relegated businesses subject to the pervasive impact of government aid and regulation to such a limbo.²⁴ Instead, this Court and lower courts have resolved, rather than deferred, issues of agency power when tendered in a concrete factual setting. *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978); *Independent Bankers Association of America v. Smith*, 534 F.2d 921, 926-930 (D.C. Cir. 1976).²⁵

²⁴Thus, "final agency action" has been found in interpretative orders, *Frozen Foods Express v. United States*, 351 U.S. 40 (1956); regulations announcing agency policy, *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956); orders embodying future agency policies, *Continental Air Lines, Inc. v. CAB*, 522 F.2d 107 (D.C. Cir. 1974); adjudicative decrees with precedential impact for the future, *Association of Bituminous Contractors v. Andrus*, 581 F.2d 853 (D.C. Cir. 1978); and in correspondence setting forth an agency's fixed statutory interpretation, *Fort Sumter Tours, Inc. v. Andrus*, 564 F.2d 1119 (4th Cir. 1977). It is obvious that the Secretary's present fixed position with respect to her statutory authority constitutes final agency action posing a purely legal question appropriate for immediate judicial resolution.

²⁵*Accord: Fort Sumter Tours, supra*, 564 F.2d at 1123-1124; *Continental Air Lines, supra*, 522 F.2d at 122-128; *Air Line Pilots Ass'n v. Department of Transportation*, 446 F.2d 236, 240-243 (5th Cir. 1971); *Dow Chemical v. Consumer Product Safety Commission*, 459 F. Supp. 378, 385-387 (W.D. La. 1978); *Standard Oil Co. v. Federal Energy Administration*, 440 F. Supp. 328, 365-366 (N.D. Ohio 1977), *aff'd*, 596 F.2d 1029, 1038-1040 (T.E.C.A. 1978).

The Government also appears to suggest, in its short discussion of Rule 54(b), that plaintiffs were necessarily relegated to one "claim" because the case arose out of one set of facts (Government Brief, pp. 41-42). But the mere fact that two claims for relief are factually interrelated does not mean that a final disposition of either in advance of the other may not be made within the meaning of Rule 54(b). *Sears, Roebuck & Co., v. Mackey, supra*, 351 U.S. 427, long ago put that theory to rest. In *Sears*, this Court sustained the appealability under Rule 54(b) of an order dismissing two counts of a complaint while leaving for further disposition two other counts, notwithstanding the fact that one of the counts dismissed and one remaining were based on common facts. This Court held that since the counts "can be decided independently of each other," 351 U.S. at 436 (Court's emphasis), entry of an order dismissing one count was a final order and a proper exercise of district court's discretion under Rule 54(b). In this case, not only *can* the claim denied (declaratory and injunctive relief barring the agency from waiving the statutory bar for any CDS vessels) be disposed of independently from the claim remaining on remand (whether such waiver was appropriate for the STUYVESANT in consideration of its competitive effects on plaintiffs), but resolution of the remaining issue could not affect resolution of the decided issue.

With the elimination of the argument that plaintiffs sought only to bar the STUYVESANT (or were legally permitted to seek only the bar of that one vessel either because of the "case or controversy" requirement or because only one claim can arise from one set of facts), the Government's long and learned exegesis on the finality requirement of section 1291 becomes irrelevant. As the Government itself recognizes, Rule 54(b) is precisely ap-

plicable where an order completely determines one or more but fewer than all of the claims advanced in a lawsuit (Government Brief, p. 40). The district court properly applied Rule 54(b) in entering its order and the court of appeals properly construed its jurisdiction as well.²⁶

B. The Order Appealed From Was Final And Appealable Under 28 U.S.C. § 1291.

Even if it were not clear beyond dispute that ABC and Trinidad brought this action to seek a declaratory order and an injunction going beyond the disqualification of the STUYVESANT so as to prohibit the agency from lifting the bar against permanent operation of any CDS-built vessel in the domestic trade, cases in the courts of appeals indicate that a remand of the nature ordered here would not detract from the finality of the decision respecting the Secretary's statutory authority. Several decisions by the courts of appeals have held that an order remanding a case to an agency for further proceedings *may* qualify for appellate review under 28 U.S.C. § 1291 where the issue determined in ordering the remand could not be reviewed at a later stage of the case and agency compliance with the remand order would thus effectively moot that issue on

²⁶In this connection, it should be noted that the district court's determination that its order was proper under Rule 54(b) was acted on not only by plaintiffs, but also by *Seatrains and the Government*, which appealed therefrom (an appeal later dismissed upon Government motion), and was concurred in by the court of appeals which reviewed the order without questioning its jurisdiction, and by the *en banc* court of appeals which refused to reconsider the panel's decision although the Government first raised this jurisdictional challenge in its suggestion for rehearing *en banc*. Clearly it would have been imprudent for plaintiffs to delay taking their appeal after they were on notice that the district court considered that it had issued a final order under Rule 54(b). See *WRIGHT, supra*, p. 27 n. 18.

further review of the agency decision. In *Cohen v. Perales*, 412 F.2d 44, 48 (5th Cir. 1969), *rev'd on other grounds sub nom., Richardson v. Perales*, 402 U.S. 389 (1971), the court permitted an immediate appeal of a decision of the district court which had remanded a case to an agency directing the agency to admit evidence theretofore barred. The court reasoned that if the agency's decision admitting the evidence was challenged by subsequent review proceedings, the second review would encompass issues going only to the weight of the evidence, thereby effectively barring the appellant from obtaining appellate review of the earlier ruling holding the evidence admissible. Similarly, in *Gueory v. Hampton*, 510 F.2d 1222 (D.C. Cir. 1975) the court of appeals held immediately appealable a district court order remanding a case to an agency because the court reasoned that the legal standards which the district court directed the agency to apply on remand would not be subject to appellate review on a second appeal from the agency decision applying those standards.²⁷ Thus orders remanding cases to agencies have been held final within the meaning of § 1291 where the opportunity for review of the appellate decision ordering remand would not be preserved upon further judicial scrutiny of the agency decision on remand.

The deciding principle of these cases is directly applicable to the case at bar. Despite the Government's bland assurances to the contrary (Government Brief, p. 30 n. 30) there is no way to know whether *appellate* review of a district court review of the agency's decision on remand would occur, or, if it did, whether the issue of agency authority would be preserved for appellate consideration.

²⁷See also *Citizens To Preserve Overton Park, Inc. v. Brinegar*, 494 F.2d 1212 (6th Cir. 1974), *cert. denied*, 421 U.S. 991 (1975) and *Wells v. Southern Airways, Inc.* 517 F.2d 132 (5th Cir. 1975), *cert. denied*, 425 U.S. 914 (1976) in which courts of appeal also reviewed district court orders remanding cases for further agency proceedings.

It is impossible to be certain that appellate review of the predominant issue of agency authority would be available because it is impossible to predict the future course on remand. If, for example, the Secretary had determined upon remand that the competitive effects of the STUYVESANT upon plaintiffs and others were such as to withhold from exercising the waiver authority (or if the district court reversed an agency decision on remand which determined the waiver for the STUYVESANT was proper), the agency power would no longer be open to appellate review, and the district court decision would be binding. While the STUYVESANT would be barred from the trade right now, assuming, *arguendo*, this was all that the complaint had sought, there is nothing in the district court opinion that would have restricted the agency from "waiving" the bar in the future for the STUYVESANT. The district court opinion did not restrict the Secretary's waiver power to the moment a vessel begins to operate, and such power could be deemed to include later waivers dependent only upon repayment of "unamortized" subsidy (see discussion *infra*, pp. 53-54 & 102-103). Plaintiffs would then be finally precluded from challenging the decision rendered in the district court on the issue of agency authority although that decision would have binding, precedential effect, as to both the STUYVESANT and all other CDS-built vessels.²⁸

If, *arguendo*, appellate review of a district court decision reviewing the order on remand were an assured avenue open to plaintiffs, it is still by no means clear

²⁸Thus ABC and Trinidad would be unable to submit for appellate review a lower court opinion that made a 5,000,000 deadweight aggregate tonnage market, built years ago at a fraction of the cost of current construction, "waivable" into the Jones Act fleet at the discretion of the Secretary, a holding immediately devaluing plaintiffs' existing assets and halting its future growth.

whether the issue of agency authority ever to waive the statutory power would be preserved for appellate consideration at that later stage. Since the district court had dismissed the case, the record on remand, and in district court on review of the remand order, would not encompass any of the facts or arguments relating to the issue of statutory authority. In fact, the appeal of the decision on remand, filed by respondent Shell, was newly docketed (No. 78-1919). The old record in Nos. 77-1645 and 77-1647 was closed. For the court of appeals to review the issue of agency authority, the earlier record, from which no appeal had been taken, would have to be certified up; yet the earlier case stood dismissed, and the time for appeal would long since have expired. *And of course if Rule 54(b) had been properly invoked by the district court, plaintiffs would have been time barred.* The course the Government now recommends would have been hazardous at best, and, if the district court and the court of appeals properly interpreted Rule 54(b), that course would have been fatal.

Coopers & Lybrand, supra, cited by the Government, does not detract from the principles set forth in the appellate decisions cited *supra*, pp. 36-37, or their applicability here. *Coopers & Lybrand* considered whether an admittedly interlocutory order of the court of appeals fell within that "small class" of cases exempted from the finality requirement of 28 U.S.C. § 1291 under *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), because it conclusively determined an important issue completely separate from the merits of an action, and was effectively unreviewable on appeal from a final judgment. Attempts to define that "small class" have been legion,²⁹

²⁹Cases following *Cohen* have not delineated with precision those orders which, although technically interlocutory, should nonetheless be immediately appealable because of their finality as a practical mat-

but all involve admittedly interlocutory orders which are not final dispositions of one or more of multiple claims. While not all cases in which a remand order is issued automatically qualify for the "small class" exception, as

ter with respect to a qualifying collateral matter. Fifteen years after *Cohen*, in *Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964), this Court expanded the class by giving the finality requirement a "practical rather than a technical construction," introducing a finality test which balanced "the inconvenience and cost of piecemeal review on the one hand and the danger of denying justice by delay on the other." 379 U.S. at 152-153. Ten years after *Gillespie*, this Court in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974) held immediately appealable an order assessing notice costs, an appellate court having previously reviewed "a death knell" certificate denying class certification. While the order assessing costs may have survived *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), the central collateral issue in *Eisen* fell with *Coopers & Lybrand* as an order qualifying for *Cohen* treatment. The balancing test of *Gillespie* as a gloss upon *Cohen* may have survived *Coopers & Lybrand* in the determination of "final" issues qualifying for Supreme Court review in appeals from state courts wherein federal and state issues are combined, the federal issue determined, but the litigation not ended. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 486-487 (1975). Three years after *Eisen*, in *Abney v. United States*, 431 U.S. 651 (1977), the Court applied *Cohen* not only to collateral orders that "finally determine[d] a claim of right," but also to a category of "fully consummated decision[s]." 431 U.S. at 659. In *Abney*, a pretrial order denying a motion to dismiss an indictment on double jeopardy grounds was held to fall within the class, because "the rights conferred on a criminal accused by the Double Jeopardy clause would be significantly undermined if appellate review of double jeopardy claims were postponed until after conviction and sentence," 431 U.S. at 660, even though review of the double jeopardy argument would have been available after conviction. *Abney* was not, however, expanded to include a "collateral" order denying a motion to dismiss an indictment on grounds of denial of a speedy trial, because such denial would not "cause or compound the deprivation already suffered." *United States v. MacDonald*, 435 U.S. 850, 861 (1978). The following year this Court held an order denying a motion to dismiss an indictment based on the Speech or Debate Clause immediately appealable. *Helstoski v. Meanor*, 442 U.S. ___, 99 S.Ct. 2445 (1979). Thus in the criminal field, perhaps, it is less the "collateral" nature of

the cases cited by the Government show (Government Brief, p. 29),³⁰ some do. Thus *had* plaintiffs' claim for

the order than its impact which is the touchstone of the *Cohen* application.

One observation which we think will survive in this area is Justice Powell's statement in *Eisen*, *supra*, that:

"[W]hile the application of § 1291 in most cases is plain enough, determining the finality of a particular judicial order may pose a close question. No verbal formula yet devised can explain prior finality decisions with unerring accuracy or provide an utterly reliable guide for the future."

and his further observation that

"[A]s long ago as 1892 the Court complained: 'Probably no question of equity practice has been the subject of more frequent discussion in this court than the finality decrees. . . . The cases, it must be conceded are not altogether harmonious.' " 417 U.S. at 170 n.9.

An aphorism chronicling the cases and presaging the statement, *supra*, from *Eisen* was the observation that the final decision rule is ". . . a labor saving device which causes more labor than it saves." Crick, "The Final Judgment As A Basis Of Appeal," 41 Yale L.J. 539, 558 (1932).

³⁰In some of these cases the district court had expressly retained jurisdiction: *Freeman v. Califano*, 574 F.2d 264 (5th Cir. 1978); *Gior-dano v. Roudebush*, 565 F.2d 1015 (8th Cir. 1977); *Silver v. Secretary of the Army*, 554 F.2d 664 (5th Cir. 1977); *Dalto v. Richardson*, 434 F.2d 1018 (2d Cir. 1970); most of the cases involved remands for further proceedings based upon procedural errors, deciding none of the claims for relief; *Barfield v. Weinberger*, 485 F.2d 696 (5th Cir. 1973); *Pauls v. Secretary of the Air Force*, 457 F.2d 294 (1st Cir. 1972); *Bohms v. Gardner*, 381 F.2d 283 (8th Cir. 1967), *cert. denied*, 390 U.S. 964 (1968) (in *Bohms*, the remand order left all issues open, and the judge had expressly refused to certify his remand order for interlocutory review under 28 U.S.C. § 1292(b)); one of the cases held that a suit for enforcement of an award by the National Railway Adjustment Board resulting in a remand is not final, analogizing the situation to the issuance of a stay pending arbitration: *United Transportation Union v. Illinois Central R.R.*, 433 F.2d 566 (7th Cir.

relief encompassed only relief against the operation of the STUYVESANT, a persuasive case might be made that the district court decision sustaining the agency's authority was immediately appealable under 28 U.S.C. § 1291. Certainly that decision determined an important issue and, because the case stood dismissed, it appeared to have foreclosed that issue from further review. It would be the issue on remand, rather than the issue determined by the first decision, which would then be separate from or collateral to the merits of the action. While the Government's general statement (Government Brief, p. 29) that remands to an administrative agency ordinarily do not constitute final decisions is correct, the cases cited as appellate applications of that principle are factually far less comparable to the case at bar than *Cohen v. Perales*, *supra*, or *Gueory v. Hampton*, *supra*.

1970), *cert. denied*, 402 U.S. 915 (1971); and one of the cases held that the district court decision was final under 28 U.S.C. § 1291 as qualifying for the *Cohen* exception to the finality rule: *Ringsby Trucklines, Inc. v. United States*, 490 F.2d 620, 624 (10th Cir. 1973). Of all of these cases, only *Bachowski v. Usery*, 545 F.2d 363, 373 (3d Cir. 1976) considered the application of the *Perales* doctrine, *supra*, p. 37, and held that appealability of the order there involved would require an extension of that doctrine.

C. If The Order Appealed From Was Not Final And Appealable Under Rule 54(b) Of The Federal Rules Of Civil Procedure Or 28 U.S.C. § 1291, It Was Appealable Under 28 U.S.C. § 1292(a)(1) As An Interlocutory Order Denying An Injunction.

Even if, *arguendo*, the court of appeals lacked jurisdiction under Rule 54(b), or under 28 U.S.C. § 1291, the case was properly before the court of appeals under 28 U.S.C. § 1292(a)(1).³¹ In granting defendants' summary judgment on all claims except the claim remanded, the district court finally denied ABC's and Trinidad's request for an injunction. Courts of appeals uniformly have taken jurisdiction under 28 U.S.C. § 1292(a)(1) over denials of requests for permanent injunctions, providing that such denial did not represent merely a postponement of a decision on the request. *Ackerman-Chillingworth v. Pacific Electrical Contractors Association*, 579 F.2d 484, 489 (9th Cir. 1978), *cert. denied*, 439 U.S. 1089 (1979); *Paeco, Inc. v. Applied Moldings, Inc.*, 562 F.2d 870, 879 (3d Cir. 1977); *W. L. Gore & Associates, Inc. v. Carlisle Corp.*, 529 F.2d 614, 617-618 (3d Cir. 1976); *McNally v. Pulitzer Publishing Co.*, 532 F.2d 69 (8th Cir. 1976), *cert. denied*, 429 U.S. 855 (1976); *Wrist-Rocket Manufacturing Co., Inc. v. Saunders Archery Co.*, 516 F.2d 846, 849 (8th Cir. 1975), *cert. denied*, 423 U.S. 870 (1975); *Equal Employment Opportunity Commission v. International Longshoremen's Association*, 511 F.2d 273, 276-277 (5th Cir. 1975), *cert. denied*, 423 U.S. 994 (1975); *Medical Development Corp. v. Industry Molding Corp.*, 479 F.2d 345, 347 (10th Cir.

³¹This section grants courts of appeals jurisdiction from ". . . [i]nterlocutory orders of the district courts of the United States . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court. . ."

1973); *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 461 F.2d 1040, 1042 (2d Cir. 1972). *Equal Employment, supra*, considered at length whether there was any bar to appellate jurisdiction on an appeal from an interlocutory order denying a permanent injunction, as distinguished from a preliminary injunction and concluded that there was none, basing its decision not only on the language of the statute, which admits of no such distinction, but also upon consideration of the policy against piecemeal appeals, which is not subverted by preserving the right to appeal from a denial of a permanent injunction so long as that injunction finally resolves the issue under consideration. 511 F.2d at 276.³²

³²While this Court has not directly addressed the issue, the opinions of this Court indicate that the thus far uniform appellate interpretations of § 1292(a)(1) are correct. Thus in *Switzerland Cheese Association, Inc. v. E. Horne's Market, Inc.*, 385 U.S. 23 (1966), this Court held that denial of a permanent injunction on the grounds that there remained triable issues of fact did not constitute the kind of interlocutory order denying an injunction comprehended by 28 U.S.C. § 1291(a)(1). In so holding, this Court took pains to point out that its decision was not based on the view that "interlocutory" or preliminary may not at times embrace denials of permanent injunctions, but because the denial of a motion for a summary judgment because of unresolved issues of fact does not settle or even tentatively decide anything about the merits of the claim." 385 U.S. at 25. By contrast, here the denial of a permanent injunction finally decided the merits of the claim. In *Liberty Mutual, supra*, pp. 31-32, 424 U.S. 737, 744-745, this Court indicated that review of an order deciding the merits of the action in plaintiff's favor, but declining to issue an injunction at the time of decision, did not constitute an appealable order under § 1292(a)(1) because the party appealing was not the party who had been denied the injunction, but was instead the party who had lost on the merits. The Court said that "... even if this [the denial of an injunction] would have allowed *respondents* to then obtain review in the Court of Appeals, there was no denial of any injunction sought by *petitioner* and it could not avail itself of that grant of jurisdiction." *Id.* In *Sears, Roebuck, supra*, p. 35, the dissenting Justices, who dissociated themselves from the holding that an order dismissing two

The Government argues that there was no final decision with respect to the denial of an injunction because an injunction might have issued against the permanent operation of the STUYVESANT in the Alaskan oil trade following review of the Secretary's decision on remand. Once again, the Government obdurately refuses to recognize the reach of the complaint. In the prayer for relief, ABC and Trinidad clearly asked for an injunction going to the exercise of the agency's authority to lift the statutory bar for any and all CDS vessels, not just the STUYVESANT,³³ and once again, that request for injunctive relief was finally decided adversely to plaintiffs by the district court's order of November 30, 1977.

counts of a complaint while two remained was a proper order under Rule 54(b), nevertheless concurred in the Court's result on the ground that the court of appeals had jurisdiction because such dismissal was an "interlocutory order denying an injunction" within the meaning of 1292(a)(1). 351 U.S. at 443. And in *Smith v. Vulkan Iron Works*, 165 U.S. 518 (1897), this Court, interpreting a predecessor statute to 28 U.S.C. 1292, which vested jurisdiction in appellate courts from orders granting or continuing injunctions, found jurisdiction to consider the merits of an order granting a permanent injunction although the case was not finally concluded by that order.

³³Prayer (3) of the ABC/Trinidad prayer for relief asks the Court to issue an order: "(3) permanently enjoining the Secretary of Commerce the Maritime Administration and the Maritime Subsidy Board from amending any construction-differential subsidy contracts or taking any other action to lift the restrictions of Section 506 of the Merchant Marine Act, 1936 permitting the operation of vessels built with construction-differential subsidy in domestic commerce either on condition of repayment of unamortized subsidy or otherwise (except on a temporary basis for less than six months in any year)" (A. 63). This prayer was in *addition* to the prayer requesting injunctive relief to bar the STUYVESANT which was set forth in these terms: "(1) permanently enjoining the agency from taking any steps to carry out the actions set forth in two letters each dated August 31, 1977 from MarAd/MSB, to Polk Tanker Company and Queensway Tankers, Inc. and declaring all such actions null and void." (A. 62).

Accordingly, the Government's entire discussion on the inapplicability of section 1292(a)(1) has no reference to the facts of this case. Under existing appellate precedent, the court of appeals had jurisdiction under 28 U.S.C. § 1292(a)(1) if the order of November 30, 1977 is deemed interlocutory.

II. THE SECRETARY OF COMMERCE LACKS POWER TO WAIVE THE RESTRICTIONS AGAINST OPERATION IN THE DOMESTIC TRADES OF VESSELS BUILT WITH CONSTRUCTION-DIFFERENTIAL SUBSIDY.

A. The Statutory Framework For Government Assistance To The United States Merchant Marine Does Not Permit The Grant Of Construction-Differential Subsidy For Vessels That Will Permanently Serve The Domestic Trades.

The court below began its statement of the case with the observation, unchallenged here, that "[i]t has long been recognized that the cost of building ships in U.S. shipyards, and likewise the cost of operating vessels with American crews and according to American safety standards, is considerably higher than construction in foreign shipyards or operation with foreign crews. It has also long been recognized that an adequate merchant marine is vital to both the national defense and the commercial welfare of the United States." (Pet. App. 4a). These two realities are the underpinning of the maritime legislation relevant to this case — legislation designed to aid and promote the U.S. Merchant Marine.

Since the early days of this republic, there has been legislation reserving the "domestic trades", *i.e.*, commerce

between points in the U.S., to ships built and registered in the U.S.³⁴ This reservation is currently found in the Jones Act.³⁵ U.S.-built ships which can freely operate in the domestic trades are called the "Jones Act fleet" and these vessels are a distinct segment of the U.S. Merchant Marine. Because all ships operating in the domestic trades must be U.S.-built and operated, there has never been a need for cash subsidies to the Jones Act fleet and the Merchant Marine Acts do not provide for Government payment of cash subsidies to operators of vessels in the domestic trades (Pet. App. 5a).

In U.S. foreign commerce, there is no reservation of trade for U.S.-built and operated vessels. The congressional approach, in foreign commerce, was to seek to preserve at least a portion of foreign trade for such vessels. To accomplish that purpose, it was necessary to equalize the competitive position of ships both built in U.S. shipyards and operated under the U.S. flag. Direct cash subsidy was the method adopted to keep U.S. vessels competitive in U.S. foreign commerce.

³⁴Legislation setting forth this provision was first enacted in 1817. Act of March 1, 1817, ch. 31, 3 Stat. 351. A predecessor of the 1817 law, the second law passed under the new Constitution in 1789, imposed taxes on foreign vessels carrying U.S. goods between U.S. ports. An Act Imposing Duties on Tonnage, ch. 3, 1 Stat. 27 (1789).

³⁵Section 27 of the Merchant Marine Act, 1920, 46 U.S.C. § 883. This Act is designed "to protect the American shipping industry already engaged in the coastwise trade, to provide work for American shipyards, and to improve and enhance the American Merchant Marine." *Marine Carriers Corp. v. Fowler*, 429 F.2d 702, 708 (2d Cir. 1970), *cert. denied*, 400 U.S. 1020 (1971). (The term "Jones Act" is often used to refer to Section 33 of the Merchant Marine Act, 1920, 46 U.S.C. § 688, which provides for recovery for injury to or the death of a seaman, but as used herein the term Jones Act refers to Section 27 of the 1920 Act).

The subsidy programs began in the mid-19th century with contracts providing subsidies for carrying the mail; this program was much abused, but continued even after the end of World War I when the U.S. found itself with a surplus of U.S.-built vessels. By the mid-1930s, the surplus had become a deficit again and, in 1936, Congress overhauled the structure of Government assistance for the U.S. Merchant Marine by passage of the Merchant Marine Act, 1936, 46 U.S.C. § 1101 *et seq.* (hereafter, "Act"). The Act replaced the program of mail subsidy contracts with a program granting private companies construction-differential subsidy (CDS) and operating differential subsidy (ODS). The subsidies were designed, respectively, to equalize the cost of building vessels in U.S. yards and operating vessels under the U.S. flag with the costs of foreign construction and foreign operation.

CDS was established by Title V of the Merchant Marine Act. The very first sentence of Title V (Section 501) establishes the threshold requirements for seeking government assistance in the form of a subsidy to build a ship in a U.S. shipyard. Two requirements are set forth: (1) the person making application must be either a proposed ship purchaser who is a citizen of the U.S. or else a shipyard of the U.S.; and (2) the purpose of the application must be for aid to construct a new vessel "to be used in the foreign commerce of the United States". 46 U.S.C. § 1151. Section 501 then sets forth the criteria to be applied by the Secretary of Commerce for determining whether to grant the application.

The next sections of Title V describe various methods whereby the construction of vessels in U.S. yards can be subsidized. For example, under section 502, the Secretary may pay for the entire construction of the vessel and may contract to sell it for a lower price. 46 U.S.C. § 1152. Sec-

tion 504 provides an alternative to the section 502 method of participation in vessel construction: section 504 authorizes the Secretary to pay a subsidy and the cost of national defense features in lieu of paying the entire cost of the vessel. 46 U.S.C. § 1154. The agency customarily follows the section 504 alternative procedure.

Section 506 defines the trades which a vessel built with CDS may ply, and in so doing statutorily requires the consent of *every* owner of such vessel to use the vessel only in the described trades. 46 U.S.C. § 1156. The first sentence of section 506 begins: "Every owner of a vessel for which a construction-differential subsidy has been paid shall agree that the vessel shall be operated exclusively in foreign trade, or. . . ." on four defined intermediate domestic trades which may be served in the course of certain, defined, world-circling voyages in foreign trade. These four trades are hereafter referred to as "incidental domestic" trade or commerce. The first sentence of section 506 also provides for a pro-rata payback of subsidy, based on comparative vessel revenues, for incidental domestic trade. The second sentence establishes the only exception under which CDS-built vessels may operate in other than foreign or incidental domestic trade:

"The Commission may consent in writing to the temporary transfer of such vessel to service other than the service covered by such agreement for periods not exceeding six months in any year, whenever the Commission may determine that such transfer is necessary or appropriate to carry out the purposes of this Act."

The third sentence of section 506 requires a proportional payback of subsidy in the event of such six month transfer to trades other than foreign or incidental domestic, and

the fourth sentence provides that no ODS shall be paid while a vessel is temporarily in trades other than foreign or incidental domestic.

Vessels built with CDS for operation in foreign commerce are called the "subsidized fleet." Like the "Jones Act fleet," they form a distinct segment of the U.S. Merchant Marine. The Jones Act fleet, while legally free to do so, cannot economically compete in foreign trades with either foreign-built vessels or with the U.S. subsidized fleet because Jones Act vessels are built without subsidy and are far more costly to build and operate. Freight rates in the Jones Act trade are higher than freight rates for the subsidized fleet because Jones Act rates reflect unsubsidized construction and operation costs (Pet. App. 5a-6a).

There is no provision of the Act which grants to a potential ship purchaser the option of building, with government CDS, a vessel to be used in either the domestic or foreign commerce of the United States, with that decision to be deferred until either completion of construction, or, still later, during the economic life of the vessel. Petitioners argue that the Secretary has the inherent power to permit such a switch, provided that the "unamortized" portion of subsidy is refunded,³⁶ and provided the Secretary reasonably determines that such switch is necessary to carry out the purposes of the Act. While the Government apparently concedes that CDS ought not be granted with the understanding that it may be returned,

³⁶The concept of "unamortized" subsidy derives from the notion that the benefits which the Government obtains from paying subsidy is the operation of a vessel during the term of its economic life. As that economic life progresses, the Government is "repaid" by the use of that vessel in foreign commerce and its availability for national defense. Thus the concept of "unamortized" subsidy refers to that portion of the subsidy which has not been "used up" by the vessel's operation in foreign trade for its full economic life.

allowing the ship to be used in any trade, if the owners later believe that trades not qualifying for subsidy have become more profitable than the permitted foreign trades,³⁷ both the Government and Seatrain argue that such switching fulfills the purposes of the Act where the intended foreign trade use diminishes and a domestic trade use materializes — at least in situations where government commitments, made under sections other than Title V of the Act and under other acts of Congress, may result in financial losses to the Government. The basic statutory framework, however, contains no hint of a permissible blending of the Jones Act and the subsidized fleets except for the two domestic trade uses permitted by Section 506: incidental domestic trade and six months per year. The basic statutory concept for CDS, as the court below held, was one of permanent dedication (Pet. App. 14a). To reinterpret that statutory framework to allow by administrative, not congressional, action a portion of the subsidized fleet to move into Jones Act trades whenever adversity threatens a particular venture is to accomplish a major restructuring of the Act for the sole purpose of rescuing both Seatrain and the Government from the consequences of unwise economic decisions.

³⁷Government Brief, pp. 54-55 & n. 60.

B. Section 506 Clearly Establishes The Only Circumstances Under Which Vessels Built With CDS May Serve The Domestic Trades.

1. The Statutory Language Is Clear And Unambiguous: Vessels Built With CDS Are Barred From Domestic Trades Except (1) For Incidental Domestic Trade Or (2) Exclusive Domestic Trade For Periods Not Exceeding Six Months In Any Year.

Section 506 ³⁸ explicitly deals with the domestic trading restrictions on CDS vessels and the circumstances in which those restrictions may be waived. The first sentence of section 506 mandates that "Every owner of a vessel" for which CDS "has been paid" (emphasis supplied) shall agree that the vessel shall be operated exclusively in foreign trade or in incidental domestic commerce, and mandates a proportional subsidy payback for such incidental domestic service. The very next sentence authorizes the agency to waive those geographic trade restrictions. The authority to grant the waiver is explicit and limited. The statute permits the agency to consent to the temporary transfer of a vessel to any service other than foreign and incidental domestic trade for a period not exceeding six months in any year. The following, third, sentence provides that when there is consent to such temporary transfer, there shall be a proportional payback of CDS. Except for the incidental domestic service, and the permissible temporary transfer to exclusive domestic operation for a period not exceeding six months in any year, there is no statutory entitlement to operate vessels upon which CDS "has been paid" in domestic service for longer than six months in any one year, upon payback of subsidy, upon promise to pay back subsidy, or upon any

³⁸Section 506 is reprinted in full in Seatrain Brief pp. 19a-20a; Government Brief pp. 18a-19a.

other conditions. By contrast, the conditions upon which the temporary transfers to the domestic service for periods not exceeding six months are allowed are set forth by statute as dependent upon a Secretarial finding that such transfer "is necessary or appropriate to carry out the purposes of this [Act]," and proportional subsidy repayment is then required, "upon such terms and conditions as [the Secretary] may prescribe."

Petitioners argue that section 506 is irrelevant to a determination of whether the Secretary possesses the power to allow vessels built with CDS to switch to domestic service. Seatrain argues that section 506 addresses only the issue of domestic trading restrictions on a vessel "that still retains the financial benefits of the subsidy" and is "silent" with respect to a vessel "that once received, but has remitted in full, its subsidy" (Seatrain Brief, p. 26). The Government echoes this argument, contending that 506 addresses only the issue of "the extent and conditions of competition between the unsubsidized domestic fleet and ships that continue to enjoy the benefits of CDS financing" (Government Brief, p. 52).

The full answer to this argument is that this is not what the statute says. The statute does not say:

- "every owner of a vessel for which a construction-differential subsidy has been paid and has not been remitted;" or
- "shall be operated exclusively in foreign trade so long as the owner continues to enjoy the benefits of CDS financing;" or
- "the Secretary may also consent in writing to the permanent transfer of such vessel to service other than the service covered by such agreement

provided that the full [or the unamortized portion of the] subsidy has been repaid;" or

- "the Secretary may consent in writing to the permanent transfer of such vessel to service other than the service covered by such agreement upon determination that such transfer is necessary or appropriate to carry out the purposes of this chapter and upon such conditions as he may prescribe."

All of these alternative statutory formulations and permutations of the existing statutory language would support petitioners' formulation that there is a whole class of transfers to domestic service other than those set forth in section 506.³⁹ The fact that certain categories of transfers are permitted by statute, as *exceptions* to the general rule barring transfers, does not support the argument that there are other categories of transfers which, if not specifically *barred* as exceptions, are therefore implicit exceptions to the general prohibition. Recognized judicial canons of construction take the opposite and more logical tack.

The applicable canon of statutory construction is that where Congress provides specific exceptions to a general statutory rule, all exceptions not mentioned are excluded. See *National Railroad Passenger Corporation v. National Association of Railroad Passengers*, 414 U.S. 453 (1974); *Continental Casualty Company v. United States*, 314 U.S.

³⁹And the omission of such language is not without consequence. As stated by Judge Cardozo:

"[A statute] is as significant for what it omits as for what it says." *Moskowitz v. Marrow*, 251 N.Y. 380, 399, 167 N.E. 506, 511 (1929) (Cardozo, C.J. concurring).

527, 533 (1942); *Saxon v. Georgia Association of Independent Insurance Agents, Inc.*, 399 F.2d 1010, 1014 (5th Cir. 1968); *Gotkin v. Miller*, 379 F. Supp. 859, 865 (E.D.N.Y. 1974); *Herzberg v. Finch*, 321 F. Supp. 1367 (S.D.N.Y. 1971). Petitioners have cited no decision of this Court or any other court which applied the canon of statutory construction here suggested: when a statute sets forth a small class of exceptions, any other exception may be read into the statute provided only there is no specific language precluding such an exception.

Only recently, this Court has refused to read a statute which allowed an agency to taken an action limited in duration beyond the statutory time limitation — notwithstanding the agency's argument that such an expansive statutory reading was necessary to further its broad statutory mission. In *Securities & Exchange Commission v. Sloan*, 436 U.S. 103 (1978), the Securities & Exchange Commission had sought to issue a series of consecutive 10-day suspension orders under a statute which permitted it to summarily suspend trading "for a period not exceeding 10 days." The agency argued that as there was no statutory language precluding a series of suspension orders, the statute did not bar such a series, but merely limited the duration of any single order to ten days. This Court refused to expand the agency's powers by implying agency power to issue more than one suspension order, which would have effectively extended the time of suspension under a statute which established a 10 day time limitation for suspension orders. 436 U.S. at 111-112. So here, a statute which permits exclusive operation in the domestic trade for no longer than six months in any one year in the discretion of the agency cannot be deemed "silent" on the issue of whether longer operation in the

domestic trades is consigned to the discretion of the agency. To so interpret this statute would undermine the settled canons of statutory construction under which the legislature and judiciary have together created a government of laws.

Application of a second settled canon of statutory construction would result in affirmance of the decision below without further investigation of the "aids" to statutory construction so liberally offered by petitioners to evade the plain meaning of the Act. That canon is that where a statute is plain and unambiguous on its face, no resort to the legislative history is required. *United States v. Oregon*, 366 U.S. 643 (1961); *Ex Parte Collett*, 337 U.S. 55, 61 (1949); *Gemsco v. Walling*, 324 U.S. 244, 260 (1945); *United States v. American Trucking Associations*, 310 U.S. 534, 543 (1940). Again, only recently this Court had occasion to apply that principle. *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978).⁴⁰

The statute is so plain and unambiguous on its face, creating two exceptions to a bar against the operation of a CDS-built vessel in the domestic trade, neither of which exception authorizes the waiver of that bar for exclusive, long-term operation in domestic trade, that petitioners' lengthy discussions of legislative history of the enacting Congress, prior Congresses, later Congresses, and subsequent administrative constructions, are unnecessary to establish the bounds of administrative power. The authorities cited and arguments urged by petitioners are discussed below to show that neither the legislature which

⁴⁰437 U.S. at 184 n. 29. The Court in *Tennessee Valley Authority* stated the applicable principle of law as follows:

"When confronted with a statute which is plain and unambiguous on its face, we ordinarily do not look to legislative history as a guide to its meaning." *Id.*

enacted the present section 506 nor any subsequent legislatures have evidenced an intention that the Act should be constructed other than as written.

2. The Legislative History of Section 506 Reveals That Congress Did Not Intend The Agency To Have Any Power To Waive The Bar Against Transfer Of A CDS-Built Vessel Into Domestic Trades For Periods Exceeding Six Months In Any Year.

Petitioners argue that the legislative history supports their construction that Congress intended the Secretary to have the power to waive the restriction against the operation of CDS-built vessels in the domestic trade for periods longer than six months upon repayment of subsidy or repayment of the unamortized portion of the subsidy. The argument runs that Congress intended to confer such power upon the Secretary in the 1936 Act, as shown by the section 506 then enacted; that section 506 contained an ambiguity concerning whether pro-rata repayment of subsidy was required for temporary transfer (of no more than three months, under the 1936 Act) or for incidental domestic commerce;⁴¹ that to clarify such ambiguity Congress amended section 506, deleting the provision which empowered the Secretary to authorize permanent transfers; that such deletion was inadvertent, or perhaps was intended by the then chairman of the agency, Commissioner Kennedy, but not by Congress; and therefore the

⁴¹The Government argues that the "ambiguity" which the 1938 amendments were designed to cure was whether prorata payback was required for temporary transfers (Government Brief, p. 60) while Seatrain says the ambiguity was whether such payback was required for both "incidental or temporary domestic trade" (Seatrain Brief, p. 43). The extra Seatrain ambiguity is an invention. See text, *infra*, pp. 70-71.

congressional intention respecting the Secretary's power should be respected by the courts. The evidence gathered by petitioners does not support this labored argument, and indeed the legislative history refutes it.

(a) *The 1936 Statute.*

We start with section 506 as enacted in 1936, reprinted in the footnote below.⁴² An argument may be made that

⁴² Sec. 506. It shall be unlawful to operate any vessel, for the construction of which any subsidy has been paid pursuant to this title, other than exclusively in foreign trade, or on a round-the-world voyage or a round voyage from the west coast of the United States to a European port or ports or a round voyage from the Atlantic coast to the Orient which includes intercoastal ports of the United States, or on a voyage in foreign trade on which the vessel may stop at an island possession or island territory of the United States, unless the owner of such vessel shall receive the written consent of the Commission so to operate and prior to such operation shall agree to pay to the Commission, upon such terms and conditions as the Commission may prescribe, an amount which bears the same proportion to the construction subsidy theretofore paid or agreed to be paid (excluding cost of national-defense features as hereinbefore provided), as the remaining economic life of the vessel bears to its entire economic life. If an emergency arises which, in the opinion of the Commission, warrants the temporary transfer of a vessel, for the construction of which any subsidy has been paid pursuant to this title, to service other than exclusive operation in foreign trade, the Commission may permit such transfer: *Provided*, That no operating differential subsidy shall be paid during the duration of such temporary or emergency period, and such period shall not exceed three months. Every contractor receiving a contract for a construction-differential subsidy under the provisions of this title shall agree that if the subsidized vessel engages in domestic trade on a round-the-world voyage or a round voyage from the west coast of the United States to a European port or ports or loads or discharges cargo or passengers at an island possession or

this section, as originally enacted, permitted three exceptions to the requirement that a CDS-built vessel be operated only in foreign trade: (1) incidental domestic trade; (2) operation in any domestic commerce at any time, provided total "unamortized" subsidy is paid back "upon such terms and conditions" as the agency requires; and (3) emergency transfer to domestic trade not to exceed three months. Under this reading subsidy payback was required proportionately for incidental domestic commerce, and total "unamortized" subsidy was required if the Commission lifted the bar against domestic operations other than incidental domestic trade.

Whether the 1936 Congress actually intended to authorize CDS for vessels which could so freely later switch to the domestic trades, however, is by no means as clear as petitioners suggest. For example, the bill originally introduced and reported in March 1936 by Senator Copeland did not, as Seatrain represents (Seatrain Brief, p. 35), permit a subsidized vessel's permanent return to the domestic trade solely upon agency consent and subsidy repayment. While section 506(b) of this bill contains the language that no CDS-built vessel "shall be operated other than exclusively in foreign trade unless the owner of such vessel shall receive the written consent of the authority so to operate and prior to such operation shall pay to the

island territory as permitted by this section, that the contractor will repay annually to the Commission that proportion of one-twentieth of such construction subsidy as the gross revenue of such protected trade bears to the gross revenue derived from the entire voyages completed during the preceding year." Act of June 29, 1936, ch. 858, § 506, 49 Stat. 1999.

The Government reprint of the original section 506 (Government Brief, pp. 59-60 n. 65) omits the last sentence of 506 as the statute was enacted in 1936.

United States" the unamortized subsidy, section 506(c) of that same bill, not cited by Seatrain, provided that:

"In no case shall the Authority grant its consent to operate a vessel, in respect of which a construction differential subsidy has been paid pursuant to this part, exclusively in coastwise trade, except to replace a vessel engaged in such trade, or unless there are not available vessels to serve adequately the needs of commerce in such trade in the service, route, or line in which it is proposed to operate such vessel."⁴³

⁴³See S. 3500, 74th Cong., 2d Sess. (Committee print, March 3, 1936). Other predecessor bills to the 1936 statute containing equivalent threshold requirements for transfer were S. 2582, 74th Cong., 1st Sess. (as reported May 24, 1935); H.R. 8555, 74th Cong., 1st Sess. (June 19, 1935); H.R. 8555, 74th Cong., 1st Sess. (June 27, 1935); S. 3500, 74th Cong., 2d Sess. (January 6, 1936); S. 3500, 74th Cong., 2d Sess. (March 26, 1936).

While the Guffey bill, S. 4100, 74th Cong., 2d Sess. (1936), cited by petitioners (Seatrain Brief, pp. 36-37; Government Brief, pp. 58-59) did not contain these threshold requirements before any transfer from foreign to domestic trade was permitted by the Secretary, it did require repayment of unamortized subsidy "prior to such operation" in non-foreign trade. The Guffey bill was not "essentially adopted . . . as section 506" of the Merchant Marine Act as the Government contends (Government Brief, p. 59). Section 506 as enacted in 1936 bore as much or more resemblance to Senator Copeland's bill and the House bills as to Senator Guffey's. Thus the requirement of prior payment contained in the Guffey bill was omitted, and payment of unamortized subsidy appeared conditioned only upon such terms and conditions as the Commission might prescribe; in other bills and in the statute as enacted, but *not* in the Guffey bill, (1) the permitted incidental domestic commerce was described in detail; (2) national defense features were excluded from the repayment provisions; and (3) prorata repayment for incidental voyages was required. Seatrain more accurately (p. 37) characterizes the enacted section 506 as containing "the essential terms" of Senator Guffey's bill (Seatrain Brief, p. 37). Indeed it did, as it contained the "essential terms" of virtually all of the predecessor bills.

Nevertheless, assuming *arguendo* that the language of section 506 as enacted in 1936 did permit the unlimited transfer to domestic trades of vessels built with subsidy upon repayment of unamortized subsidy, that is no longer the law. Section 506 was entirely rewritten in 1938, and the language to which petitioners point with satisfaction is no longer in the statute. The legislative history of the 1938 amendment shows that the later Congress purposefully and explicitly rewrote section 506 in its entirety, and in so doing *intentionally removed* the language upon which petitioners rely — language characterized by that Congress as "confusing" and "ambiguous".

(b) *The 1938 Amendment.*

The court below held that whatever the "sponsors of the 1936 Act" intended, the action of Congress in 1938 removed from section 506 "the only language which could be interpreted to authorize more than a temporary waiver of the restriction against employment in the domestic trade." (Pet. App. 27a-28a). The court characterized the intention of that Congress as unmistakable in (a) its elimination of the only statutory language which could arguably have authorized the Secretary's action here, and (b) its limitation of the waiver into domestic trade to six months in any year with "no discretion in the Secretary to authorize a longer period." (*Id.* at 28a). The court below found that the 1936 version of the section 506 was susceptible to two readings: that both unlimited and temporary three-month waivers of the foreign trade requirement were authorized, *or* that only temporary waivers were authorized. The court further found that the possibility of these conflicting readings was the ambiguity which the agency expressed to Congress in 1938 when section 506 was completely rewritten (Pet. App. 22a-23a & n. 44).

Petitioners seek to argue here that the court below was wrong, because Congress' elimination of the language arguably conferring upon the Secretary the disputed authority was done inadvertently, in the course of clarifying a totally different ambiguity. They claim that the ambiguity which Congress addressed was whether or not proportionate subsidy payback was required for the temporary transfer of a CDS vessel to the domestic trade (Government Brief, p. 60) or, in Seatrain's formulation, for "incidental or emergency temporary trading" (Seatrain Brief, p. 39). The argument does not stand up against the legislative background.

The actual "ambiguity" which Congress intended to clarify is clearly revealed upon a careful reading of two pieces of legislative history explaining the reasons for the 1938 changes: the congressional statement of the then Chairman of the Maritime Commission (Joseph P. Kennedy) and the pertinent Senate Commerce Committee Report. Mr. Kennedy's statement contains three essential paragraphs — the first explains the problem that he saw with the 1936 version of section 506, and the latter two explain the solution as embodied in the 1938 amendment. The problem was stated as follows:

"The section now provides that the owner can only engage in foreign trade exclusively with certain enumerated excepted services, for which services the owner is required to repay part of the construction-differential subsidy. There are also provisions which appear to give owners the right to engage in services other than the excepted ones, if the Commission consents to such use and the owner repays part of the construction-differential subsidy. Whether this right is restricted to the cases of emergency and to

periods of 3 months as mentioned in the section, it is difficult to determine."⁴⁴

The first two sentences of the above statement are obviously intended to convey what the 1936 Act permitted or might be read to permit. The first sentence refers to services that may be performed without Commission consent, and the second sentence refers to *other* services which require Commission consent. Under the 1936 statute, the services which required Commission consent were *not* services in incidental domestic trades, but were three-month domestic trade transfers and, perhaps, permanent transfers to domestic trade. The only "enumerated" services excepted from the foreign trade requirement were incidental domestic trades, which were, indeed, enumerated, in the sense that each of the four permissible incidental domestic uses was described *seriatim* in the beginning of the original 1936 statute. Thus in the first sentence, Chairman Kennedy was clearly describing foreign and incidental domestic service which could be performed by CDS-built vessels without agency consent. In the second sentence, he was describing services (for which consent is required) *other* than those services he had described in the first sentence — *i.e.*, *other* than foreign and enumerated incidental domestic services.⁴⁵ It is in the second sentence, when Chairman Kennedy talks about services other than in foreign and incidental domestic trades, that he first

⁴⁴Amending Merchant Marine Act, 1936: Hearings on H.R. 8532 Before the House Committee on Merchant Marine and Fisheries, 75th Cong., 2d & 3d Sess. 8 (1937-1938) (hereafter, "House Hearings on the 1938 Amendments).

⁴⁵Taken together, the first two sentences show that Kennedy interpreted the Act as requiring prorata repayment of subsidy *whenever* the operator engaged in other than foreign trade: either incidental domestic service, three month transfer, or, arguably, a permanent return to the domestic trade.

refers to a "right;" the third sentence then queries whether that "right" is restricted only to cases of emergency and three months. Clearly, Kennedy was querying whether there existed, side by side, two concomitant rights to engage in services other than foreign and incidental domestic service. He was unclear (" . . . it is difficult to determine . . .") as to whether the statute conferred a three-month right *and* a permanent right (both of which require his agency's consent), or whether the statute conferred only the former, three-month right. In no way can this paragraph be read as an inquiry into the necessity of paying back subsidy, which is the "ambiguity" petitioners urge as the reason for the 1938 clarification.

This obvious interpretation is confirmed by the ensuing two paragraphs of Mr. Kennedy's statement which describe the suggested amendment, now enacted:

"As the section is rewritten it is perfectly clear that if the owner engages in the services, other than foreign, which are enumerated in the section, he is required to repay a part of the construction-differential subsidy to be determined upon the relation which the gross revenue derived from the domestic trade bears to the entire gross income derived from the voyages completed during the preceding year.

If the owner desires to engage in domestic trades other than those enumerated in the section, he can do so only by receiving the consent of the Commission. The consent for this service is limited to 6 months in any one year. If the owner operates under such consent, he is required to repay to the Commission a part of the construction-differential subsidy, to be deter-

mined upon the relation which the period of such use bears to the entire economic life of the vessel. During the period of such use the owner is prevented from receiving any operating-differential subsidy."⁴⁶

In describing the recommended solution to the problem, Chairman Kennedy's format is identical to the format he used when stating the problem. Thus the first of the just-quoted paragraphs stating the solution relates to incidental domestic trades, as did the first sentence stating the problem; and the second paragraph, stating the balance of the solution, refers to domestic trades *other* than incidental domestic trades, as did the second sentence stating the problem. In describing section 506 as rewritten, Kennedy first says that if an owner wants to engage in incidental domestic service, again described as "services, other than foreign, which are enumerated," he may do so provided he repays subsidy, prorata. Next, Kennedy says that for all domestic trades "other than those enumerated" (again, other than incidental domestic trades), Commission consent is required and that consent "is limited to six months in any one year."

Thus Chairman Kennedy said that the rewritten section answered precisely the question he had asked about the original section, which was whether a *right* to engage in services other than foreign and incidental domestic trades was restricted to cases of temporary three-month transfers or whether that right also included permanent transfers. His difficulty in answering that question by reference to the original section was solved in the proposed amendment by providing for only one allowable use — a temporary

⁴⁶House Hearings on the 1938 Amendments, *supra*, at 8.

transfer — and its maximum duration was increased from three to six months in any one year.

Petitioners argue that Mr. Kennedy identified the wrong ambiguity — indeed that his ambiguity “strains credibility” (Seatrain Brief, p. 43). But if the 1936 Act, as petitioners contend, did allow unrestricted transfer to domestic trade upon repayment of subsidy, and also allowed an emergency transfer for three months, does it so strain credibility that an administrator might find it ambiguous and confusing that the Commission had two powers side by side: (1) to allow such unrestricted transfer with a proportionate payback, and (2) to allow only a three-month transfer? Why circumscribe transfer to domestic trade to cases of “emergency” and three months and at the same time permit unrestricted transfer to domestic commerce? Did the 1936 Congress intend to confer two rights of transfer, or is the three-month right the only permissible application of the statutory formula set out immediately preceding the “three-month” sentence?

But whether or not Mr. Kennedy was rightly or wrongly confused by trying to reconcile the simultaneous “consents” which his agency might have been authorized to give is beside the point. Mr. Kennedy, not petitioners, was seeking a restructuring of section 506 from the Congress. In so doing, he stated *his* confusion, which was not the confusion that petitioners seek to impute to the 1938 Congress as the reason for rewriting section 506. Kennedy’s confusion was whether the ability to transfer to the domestic trades was restricted to three months per year or whether there also existed a second right of transfer, of unlimited duration. His solution was to confer only one right: six months.

Seatrain appears to concede (Seatrain Brief, p. 44) that perhaps Chairman Kennedy intended to delete any

unlimited authority in the 1936 statute, but states that Congress did not. Seatrain’s argument is that there is no indication that Congress’ purposes were the same as Chairman Kennedy’s. The argument that Congress had a different reason for rewriting section 506 than did Chairman Kennedy is refuted by the relevant legislative history, only part of which is cited by Seatrain.

The part not cited by Seatrain is the statement of the author of the amendment, S. 3078, Senator Copeland, which said that Congress’ purposes were the same as Mr. Kennedy’s and the Maritime Commission’s:

“The pending bill, S. 3078, is founded on the recommendations of Chairman Kennedy and the Maritime Commission. Some modifications have been made, but no new matter has been added to the bill by the entire committee which studied it. *It has been written wholly in the light of suggestions which come from the Maritime Commission and to a great extent uses its language.*” 82 Cong. Rec. 6471 (May 9th, 1938) (emphasis supplied).

The part cited by Seatrain (Seatrain Brief, pp. 45-46), the Senate Report,⁴⁷ restates the ambiguity identified by Chairman Kennedy in almost identical language. The Senate Report’s statement of the problem is as follows:

“The section now makes it unlawful for the owner of any vessel on which a construction-differential subsidy has been paid to operate it, without the written consent of the Commission, other than exclusively in foreign trade or in other enumerated voyages to foreign ports, which may

⁴⁷S. Rep. No. 1618, 75th Cong., 3d Sess. (1938).

include domestic ports. When an emergency arises which, in the opinion of the Commission, warrants the temporary transfer of such a vessel to domestic trade, the Commission may permit the transfer. No operating-differential subsidy shall be paid during an emergency period, which shall not exceed 3 months. These provisions are definite. *The section further provides, however, that in the event the owner operates a vessel on which a construction-differential subsidy has been paid in services other than those which are not unlawful, he shall repay to the Commission a prescribed portion of the construction-differential subsidy. It is very difficult to determine whether or not these instances in which repayment is required are restricted to the cases of emergency and to periods of 3 months.*⁴⁸

The Senate Report follows the same format as Chairman Kennedy. The first sentence says that it is unlawful to operate, without the consent of the Commission, in other than foreign trades or "enumerated voyages to foreign ports, which may include domestic ports." Again, the Senate uses "enumerated" to describe incidental domestic trading which is lawful and which requires no agency consent. The second sentence refers to the three month emergency transfer provision, which does require Commission consent. The Senate Committee says, this much we know about the statute: "These provisions are definite." The italicized sentences state the dilemma. First, the Senate Report defines the scope of the uncertainty, which concerns services "*other than those which are not unlawful.*" Services *other* than those which are "*not unlawful,*" *i.e.*, services other than the lawful ones, means

⁴⁸*Id.* at 12-13 (emphasis supplied).

services in trades *other* than foreign and incidental domestic trades, since foreign and incidental domestic trades are expressly lawful. The Senate Report asked whether such other-than-lawful uses (which it had just defined as the problem area in which it said subsidy repayment is required) were restricted to cases of emergency and to periods of three months. Thus the Senate Report, following Kennedy's reasoning,⁴⁹ assumed that prorata CDS repayment for any use other than the lawful use is required, but queried whether those *instances* of use in other-than-lawful trades are restricted to the cases of emergency and limited to three month transfer, or whether longer periods are also authorized.

The Senate Committee was clearly not talking about whether repayment was required for incidental domestic trading. It was talking about "whether or not these *instances* in which repayment is required are restricted to the cases of emergency and to periods of three months." The Senate Report assumed that prorata repayment was indeed required for any other-than-lawful use, *i.e.*, three month use, but ascribed the confusion as to whether or not there were *other instances* in which repayment was also required. Such other instances would be use in domestic commerce for periods *exceeding* three months. The "*instances*" could not include incidental domestic trades (*i.e.*, "enumerated" trades) which the Senate Report described as lawful and as contained in provisions which were "definite."

The Senate Report thus said exactly what Chairman Kennedy said: aside from incidental domestic commerce, which was not unlawful, is there more than one "right" or "instance" of use by CDS-built vessels in domestic trade: (1) unrestricted use in domestic trade. and (2) three-

⁴⁹See Kennedy statement, *supra*, pp. 62-63 & n. 45.

month emergency use, or is the right to engage in domestic commerce other than lawful incidental domestic commerce restricted to cases of three months in an emergency? Neither the Senate nor Chairman Kennedy was talking about confusion or ambiguity with respect to whether subsidy repayment was required for three-month use, as well as unrestricted use; both believed that prorata return of subsidy was required certainly for the three-month transfer and for beyond-three-month transfer, *if such use were permitted*. The "if" was the question for which resolution was sought by the 1938 legislature.

Seatrains argues (Seatrains Brief, pp. 46-47) that the Senate Report did not echo the Kennedy ambiguity, but referred to the Seatrains ambiguity. Thus Seatrains states:

"... the report defines the primary difficulty with the original § 506 as the uncertainty whether proportionate CDS repayment is required for the incidental domestic trading permitted by the statute."

But this interpretation of the Senate remarks is absurd, because that ambiguity is non-existent. The original section 506 provided for a proportional CDS repayment for incidental domestic trading in the last sentence of the section.⁵⁰ This is the sentence which Seatrains appears to have

⁵⁰ "Every contractor receiving a contract for a construction-differential subsidy under the provisions of this title shall agree that if the subsidized vessel engages in [incidental domestic trade] that the contractor will repay annually to the Commission that proportion of one-twentieth of such construction subsidy as the gross revenue of such protected trade bears to the gross revenue derived from the entire voyages completed during the preceding year."

The 1936 version of section 506 is set forth in its entirety *supra* at pp. 58-59 n. 42.

overlooked in reading the original section 506 and the sentence omitted from the Government citation of the original 506 (Government Brief, pp. 59-60 n. 65) Thus Seatrains overlooked a provision of the original Act, created an ambiguity, and then assigned it to Congress.

The other "ambiguity" which the Government and Seatrains have concocted (whether three-month transfers required payback) finds no support in the legislative history. Rightly or wrongly, both Chairman Kennedy and the Senate Committee appeared to have assumed that prorata payment for three-month transfer was required by the 1936 Act, but found ambiguous and confusing whether the statute allowed two types of transfer to domestic service, restricted and unrestricted.

The same Senate Report reveals the clear and unambiguous intent of the 1938 Congress in rewriting section 506:

"As the section is rewritten, it is perfectly clear that unless the owner operates exclusively in foreign trade, he must repay a portion of the construction-differential subsidy for any service in which the vessel is engaged which includes domestic ports en route to or from foreign ports, as specifically described. It is further provided that the Commission may consent in writing to the temporary transfer of such a vessel to services other than those enumerated for periods not exceeding 6 months in any year whenever the Commission may determine that such transfer is necessary. When such consent is given, it must be conditioned upon the owner's agreement to repay a specified portion of the construction-differential subsidy. No operating-differential subsidy shall be paid during the temporary period." S.

Rep. No. 1618, 75th Cong., 3d Sess. 13 (emphasis supplied).

In the first sentence above, the Senate Report states that prorata payment is required for incidental domestic uses. In the second sentence, the report states that temporary transfer to other than incidental domestic trade is permitted upon Commission consent for periods not exceeding six months in any year. In the third sentence, the Senate states that when such consent is given prorata repayment of CDS is required. That is the limit of the Commission's authority to allow transfer of CDS-built vessels to the domestic trade. For petitioners to argue that this rewrite of section 506 left undisturbed an authority arguably based on language appearing in the original section but purposefully removed from the rewritten section is to negate the most elementary principles of logic and statutory construction. (Pet. App. 27a-29a).⁵¹

⁵¹Petitioners (Seatrain Brief p. 47; Government Brief, p. 62) seek sustenance from the statement in the House Report accompanying the amended section 506 that "[N]o fundamental change in the original purpose of the section has been affected." (H.R. Rep. No. 2168, 75th Cong., 3d Sess. 21 (1938). They argue that removal of the language allowing unrestricted transfer to domestic trade, which they, unlike Chairman Kennedy and the Senate, saw as clearly permitted by the 1936 Act, was such a fundamental change that the statement cannot be honored unless the Act is construed as if section 506 had not been rewritten. The flaw in this argument is that the authors of the legislation, unlike petitioners, clearly stated their uncertainty about whether the 1936 Act permitted two types of transfer to the domestic trade — one unrestricted and a second restricted to three month emergencies. With that fact in focus, and a clarification requested and granted to restrict transfer only to a limited duration, the statement in the House Report provides no support for the argument that the 1938 statute should be read as if it did not delete the language of the 1936 Act.

Moreover, what now appears "fundamental" to petitioners may not have appeared "fundamental" to the House and, indeed, may not be "fundamental" in view of the broad purposes which section 506 was intended to serve.

Neither Seatrain nor the Government can evade the facts that:

(1) the section as rewritten is perfectly clear and contains no language permitting the action taken by the agency here;

(2) the purpose of the legislation as clearly stated by the then chairman of the Maritime Commission was to restrict the *right* to engage in other than incidental domestic trade to one class of transfer, six months in any one year;

(3) the author of the 1938 legislation characterized his bill as containing changes which were "founded on the recommendations of Chairman Kennedy and the Maritime Commission," and "written wholly in the light of suggestions which come from the Maritime Commission . . ." (82 Cong. Rec. 6471 (May 9th, 1938));

(4) The language as rewritten left in only one consent which the agency could give: the consent that CDS vessels may ply the domestic trades for no more than six months in any year; and

(5) The Congress in 1938 repealed the language of the original section arguably supportive of petitioners' contentions.

3. Legislative Intent of Later Congresses, If Relevant, Supports The Plain Reading of Section 506 Of The Act.

By citing various statements and actions of later Congresses primarily concerned with other statutory provisions, petitioners seek to buttress their argument that the deletion, in 1938, of the only language which could arguably authorize the actions taken by the agency in respect of the STUYVESANT somehow reveals a congressional intent to continue vesting such authority in the agency. This Court has pointed out that views of members of later Congresses concerning different sections of the statute are entitled to little, if any, weight in interpreting the earlier enacted statutory language. *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 354 n. 39 (1977); *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 199-200 (1963); *United States v. Philadelphia National Bank*, 374 U.S. 321, 348-349 (1963). While petitioners thus pursue an unpersuasive method of determining legislative intent, we show below that petitioners' evidence does not prove their point. Indeed, examination of actions of later Congresses shows that Congress deemed that the restrictions against domestic trading by CDS vessels for periods of longer than six months per year could be lifted only by congressional, rather than administrative, action.

(a) *Subsequent Acts of Congress Referred To By Petitioners.*

1. The 1963 Amendments.

The Government argues (Government Brief, pp. 52-53, 63-64 & n. 67) that amendments proposed in 1963 to the Merchant Marine Act show that Congress intended that a

CDS-built vessel, upon expiration of its statutory useful life, "may operate exclusively in the domestic trade" (Government Brief, p. 53). It says that such legislation "would have expressly declared that Section 506 did not limit the trading opportunities of a subsidized ship beyond its statutory useful life" (Government Brief, p. 63 n. 67), and that it was not enacted "on the understanding that Section 506 did not restrict a subsidized ship from freely operating in the domestic trade once its subsidy had been fully amortized. See 109 Cong. Rec. 18752 (1963) (remarks of co-sponsor Senator Magnuson)." (Government Brief, p. 64 n. 67). Whether or not a vessel, once its statutory life has expired, is free to ply the domestic trades without restriction is, we contend, not strictly relevant to the issue of whether Congress intended transfer to the domestic trade of such a vessel during its useful life.⁵² In any event, the Government representation of the 1963 amendment and of the views expressed by Congress is wrong.

The bill, S. 1172, did not, as the Government contends, "declare that section 506 did not limit the trading oppor-

⁵²The relevance of this issue is explored *infra*, pp. 101-103, in connection with our discussion of the Grace Line action which was based on a Comptroller General's Opinion which did assume that a vessel could freely transfer into the domestic trade upon expiration of its statutory life. (The Government cites the Grace Line decision, No. B-155039, 44 Comp. Gen. 180 (1964) as support for its argument on this point (Government Brief, p. 53)). The statute by its terms bars entry of a vessel into the domestic trade after expiration of its useful life because it says: "Every owner of a vessel . . ." which would include, obviously, owners after such expiration. Furthermore, the agency has construed the Act to prohibit unrestricted entry into the domestic trades after expiration of a vessel's statutory economic life by providing, in its standard subsidy contract, that the section 506 restrictions shall run with the title of the vessel. See discussion, *infra*, pp. 105-106.

tunities of a subsidized ship beyond its useful life. The relevant section of that bill stated:

"Sec. 2. Section 506 of the Merchant Marine Act, 1936, as amended (46 U.S.C. § 1156) is hereby further amended so as to add the following sentence after the first sentence thereof: 'Such annual payments shall terminate at the end of the vessel's useful life for depreciation purposes as provided in section 607 of the Merchant Marine Act, 1936. Any contract between the owner and the United States which was entered into prior to the date of enactment of this Act and which would be affected if the provisions of the amendment made by this Act were applicable thereto, may, at the request of the owner be revised to be in accordance with the law as amended by this Act, with respect to such of the vessels covered thereby as may be designated by the applicant.' "

S. 1172, 88th Cong., 1st Sess. (1963).

The proposed amendment does not even appear to relate to termination of payback for six month trading, as the amendment was to be inserted after the first sentence of section 506, which deals only with payback for incidental domestic trade. Thus the amendment appears to apply only to proportionate payback for such incidental domestic service, rather than to proportionate payback for six months service, which was required by the next to the last sentence of section 506.⁵³

⁵³That the "repayment termination" provision, if enacted, would have been applicable only to incidental domestic service, leaving unaffected the obligation to make subsidy refunds for six-month domestic service after expiry of economic life, was pointed out by the Comptroller General in letters to both the House and Senate Committees considering this proposal (which ultimately was deleted from the bill as passed by Congress). See, S. Rep. No. 474, 88th Cong., 1st Sess. 3-4 (1963) (letter of the Comptroller General); H. Rep. No. 1029, 88th Cong., 1st Sess. 7 (1963) (letter of the Comptroller General).

But even if the proposed amendment would have terminated proportionate payback for six month use after expiration of useful life, the Act did not "expressly declare" *anything* about the *trading opportunities* of a subsidized ship beyond its statutory useful life. It merely stated that proportionate repayment of the subsidy would no longer be required at that time. *All of the hearings and reports cited by the Government show only that the intent was to terminate proportionate payback of subsidy at the end of a vessel's useful life; nowhere is there a statement even relating to a lifting of the bar against unrestricted use of the vessel in domestic trade.*⁵⁴

⁵⁴For example, page 2 of the House Report, which is cited by the Government, merely indicates that "payments of *refunds* of a portion of construction subsidy for operations in the domestic trade *will be based only on the whole statutory life* of the vessel . . ."; similarly, page 5 does nothing more than state that "there would be *no more refunds* of construction subsidy for domestic operation *after that [statutory life] cycle is completed.*" H. Rep. No. 1029, 88th Cong., 1st Sess. 2, 5 (1963) (emphasis added). The Government's other citations to the legislative history of the 1963 amendments are virtually identical; none of these citations contain any language either directing or approving a lifting of the statutory prohibition against permanent participation by subsidized vessels in domestic trade. The remarks of cosponsor Senator Magnuson did *not*, as the Government says (Government Brief, p. 64 n. 67), betray an understanding that section 506 as amended "did not restrict a subsidized ship from freely operating in the domestic trade once its subsidy had been fully amortized." What Senator Magnuson said was:

"Let me say further that the report language on page 3 as to the elimination of section 2 of the bill has reference to the fact that the committee understands that the formula prescribed in section 1 of the bill would by its application complete the statutory life cycle of the vessel and there would be no more refunds of construction subsidy for domestic operation after that cycle is completed." 109 Cong. Rec. 18752 (1963).

Again, there is no reference to a lifting of the bar and the Government's representations as to this unenacted bill are wholly wrong.

2. The 1970 Amendments.

The Government refers (Government Brief, p. 64 n. 67) to two congressional reports issued in 1970 relating to H.R. 15424, 91st Cong., 2d Sess.,⁵⁵ in support of its representation that later Congresses deemed trading restrictions relieved at the end of a vessel's statutory life. The citations are puzzling. The cited page of the conference report refers to amendments relating to a redefinition of the term "foreign commerce" for liquid and dry cargo carrying foreign-to-foreign services; amended authority to settle claims arising under ODS contracts; and fire provision standards for a passenger riverboat, the DELTA QUEEN. The cited page of the Senate Report refers to the agency requirements for performance bonds under the Miller Act; settlement of claims arising under ODS contracts, and the creation of a Presidential Commission on American Shipbuilding.

3. The 1972 Amendments.

Primary reliance, and for Seatrain exclusive reliance, for support of the argument that later Congresses understood that the agency possessed inherent power to authorize unlimited operation in the domestic trades is placed on the 1972 amendments to the Merchant Marine Act.⁵⁶ These amendments occurred after the agency had once exercised this power, in 1964, in respect of two "Grace Line" vessels built without subsidy but reconstructed for foreign commerce with subsidy, and thereby barred from permanent operation in the domestic trades after reconstruction.⁵⁷

⁵⁵H.R. Conf. Rep. No. 1555, 91st Cong., 2d Sess. (1970); S. Rep. No. 1080, 91st Cong., 2d Sess. (1970).

⁵⁶Pub. L. No. 92-507, 86 Stat. 909 (1972).

⁵⁷The Grace Line action, its reasoning and precedential value, are discussed *infra*, pp. 101-103. In connection with the alleged

Congressional discussion of the Grace Line action arose in connection with an amendment proposed in 1972 to section 1104(a)(3) of the Act. Section 1104(a)(3) does not deal with CDS at all; it is part of Title XI which provides for a different form of aid to the U.S. shipbuilding industry, namely government guarantees of privately-made loans which finance shipbuilding in U.S. yards. Section 1104(a)(3), added in 1972, extended the Government's authority to make guarantees of loans incurred to aid in: "financing, in whole or in part, the repayment to the United States of any amount of construction-differential subsidy paid with respect to a vessel pursuant to subchapter [Title] V of this chapter [Act]." 46 U.S.C. § 1274(a)(3).

Petitioners argument is based *not* on the language of 1104(a)(3), which allows the agency to extend guarantees for repayment of subsidy — and such repayment is specifically contemplated under section 506 in respect of incidental domestic commerce and six month per year use in domestic trade — but at language *proposed* in 1104(a)(3) which was not enacted. That language would have given the congressional seal of approval to the Grace Line action. Once again petitioners argue that congressional omission of language which would have authorized the agency actions taken here shows a congressional purpose to authorize such actions.

The proposed section 1104(a)(3), which was *not* enacted, would have permitted the Secretary to guarantee

"understandings" of later Congresses, however, that action forms the predicate for petitioners' argument that the 1972 Congress interpreted the Secretary's power as do petitioners here. (Seatrain Brief, pp. 61-66; Government Brief, pp. 67-69).

an obligation which aids in:

"financing, in whole or in part, the repayment to the United States of any amount of construction-differential subsidy paid with respect to a vessel pursuant to title V of this Act, as amended, *in order to release such vessel from all restrictions imposed as a result of the payment of such construction-differential subsidy, when such repayment is permitted by the Secretary of Commerce after considering the competitive effect of releasing such vessels from such restrictions;*

...⁵⁸

It is the words in italics that were omitted from the bill as enacted.⁵⁹

Petitioners argue that the omission of the language which would authorize the actions taken here proves the congressional intent to permit those actions because the reasons given for that omission demonstrate a congressional purpose to approve the Grace Line action. They derive that tortured result from the House Report which refers to the Grace Line case and determines not to deal legislatively with that issue. The House Report, after reciting the terms of the bill as proposed, explained its reasons for deleting this legislative approval of the Grace Line action as follows:

"In the entire history of the administration of the 1936 Act there has been only one instance where a construction-differential subsidy repayment, authorized by the Secretary under very special

⁵⁸H.R. 9756, 92d Cong., 1st Sess. (1971) (emphasis supplied).

⁵⁹Interestingly, the standard to be applied in lifting the bar, consideration of competitive effects, was the standard legislated by the district court for compliance with the Administrative Procedures Act, 5 U.S.C. § 706(2)(A). (Pet. App. 90a-94a).

circumstances, could have called into play the provisions of this paragraph. Your Committee questions the desirability of general legislation to deal with such an unusual situation, and feels that Title XI assistance should be extended to all instances of subsidy repayments under Title V, so as to include the relatively frequent situation of repayments under the first sentence of section 506 of the Act. Your Committee has therefore amended the legislation by deleting the language quoted above. This paragraph in Title XI does not in any way extend or affect the application of Title V of the Act."⁶⁰

The court below characterized the petitioners' argument of reliance on the legislative history of 1104(a)(3) as "singularly convoluted" (Pet. App. 46a). The court painstakingly dissected the argument and rejected it for four reasons (Pet. App. 47a-48a). First, the court said that insofar as the House Report was concerned, the House Committee defined the Grace Line action as "a very special circumstance" and an "unusual situation" and specifically declined to commit itself on the issue. Second, the language of 1104(a)(3) refers only to subsidy repayments *permitted* under Title V, and the only subsidy repayments so permitted are in section 506 which petitioners concede does not authorize a permanent waiver for CDS-built vessels into the domestic trade. Third, both the House and the Senate specified that their amendment "does not in any way extend or affect the application of Title V of the Act." Such a specific disclaimer can hardly be used as an argument that the construction now to be given to Title V should rely to any degree upon this amendment. Fourth, the court said that nothing contained

⁶⁰H. R. Rep. No. 688, 92d Cong., 1st Sess. 10 (1971).

in the legislative history of *Senate* approval even refers to approval of the Grace Line action or an authorization for additional waivers of domestic trade restrictions.⁶¹ Each of these reasons is sufficient to decline petitioners invitation to find authority for the agency's actions in the language explaining the non-enactment by a later Congress of an amendment to a section of the Act dealing with a different form of Government aid. We submit that together, the court of appeals' reasons are compelling.

4. The 1978 Amendments.

In citing to the 1978 amendments, once again the Government, but not Seatrain, seeks shreds of support from irrelevant acts of later Congresses. The 1978 amendment (Government Brief, p. 70) was a one-sentence act intended to allow vessels serving the U.S. Great Lakes trades to qualify for 87-1/2 percent government-guaranteed financing under Title XI of the Act despite the fact that such vessels might not meet a minimum 14 knot speed.⁶²

⁶¹Petitioners' recital of the legislative history of the 1972 amendments omits any reference to the other half of the Congress which passed the law. Nothing in the legislative history relating to Senate approval of the amendment, however tortuously construed, could possibly support petitioners' argument that by omitting the proposed language, the Senate adopted the principle reflected therein. The Senate Committee reported as follows on the bill as passed by the House:

"Paragraph (3) is new. This paragraph would permit the Secretary of Commerce to guarantee an obligation which aids in financing, in whole or in part, the repayment to the United States of any amount of construction-differential subsidy pursuant to Title V of the Act. This paragraph in Title XI does not in any way extend or affect the application of Title V of the Act." S. Rep. No. 1137, 92d Cong., 2d Sess. 9 (1972).

⁶²The amendment provided, in full, "[t]hat section 509 of the Merchant Marine Act, 1936, as amended (46 U.S.C. 1159), is amended by striking the words 'fourteen knots' in the fourth sentence, and insert-

which was previously one prerequisite to such financing. Under Title XI of the Act, the Government may guarantee loans for 75 percent of the cost of construction or reconstruction of vessels built with CDS, but 87-1/2 percent for vessels built in U.S. yards without CDS. In order to qualify for 87-1/2 percent financing, however, a vessel was required to meet the minimum speed set forth in section 509 of the Act. Prior to 1978, that speed was 14 knots. The 1978 amendment lowered it to 10 knots so that the vessels in Great Lakes trades might qualify because the optimum speed for such vessels was 10 knots.⁶³ The amendment thus put vessels serving the Great Lakes trades on a par with other unsubsidized vessels in qualifying for 87-1/2 percent government-guaranteed financing.⁶⁴

ing in lieu thereof the words 'ten knots.' " Pub. L. No. 95-505, 92 Stat. 1755 (1978).

⁶³H. R. Rep. No. 1528, 95th Cong., 2d Sess. 1 (1978).

⁶⁴The quotation in the Government brief (Government Brief, p. 70) of a Department of Commerce representation contained in the House Report to the effect that vessels affected by the amendment would include Great Lakes vessels on which subsidy has been repaid shows only that the Department of Commerce took the position, in 1978, that vessels built for foreign trades could repay their subsidy and be cleansed. Since that has been the Department of Commerce interpretation since it attempted to waive the bar for the *STUYVESANT* in 1977, it is hardly "legislative history" for the Department to take that position in 1978. It would be more instructive if the Department took a different position with Congress than it has before the courts (*see e.g. infra*, pp. 85-87). To argue that the statement in the House Report representing the position of the Department of Commerce represented a *sub silencio* agreement with that position, in a context in which Congress' attention was focused only on reducing a speed requirement to establish parity for Great Lakes vessels with other domestic vessels, is only to betray the tenuousness of the Government claim that acts of later Congresses support its position here. (*See Sloan, supra*, 436 U.S. 103, 120).

(b) *Subsequent Acts of Congress Not Referred To By Petitioners.*

By unpersuasive citations to unenacted or irrelevant amendments, petitioners have attempted to show that later Congresses interpreted the Act to permit the Secretary to create new exceptions to the bar against domestic trading by CDS vessels other than those contained in section 506. But petitioners wholly ignore the acts of later Congresses, including legislation now pending, which show the understanding of those Congresses that such exceptions must be created only by the legislative, not the executive branch of the government.

1. The Relief Act of 1940.

The Relief Act, 46 U.S.C. 1242(a), was enacted on June 29, 1940 because the operation of vessels in certain foreign trades was suspended as a result of the Neutrality Act of 1939, 22 U.S.C. § 441 *et seq.* In view of the impending national emergency, those vessels were useful in domestic trade. But in order for the vessels to be used in domestic trade the CDS contracts would have to be amended or suspended. Congress specifically gave the agency that authority in subsection (c) of that Act.⁶⁵

2. The Merchant Ship Sales Act of 1946.

This act, 50 U.S.C. App. 1735 *et seq.*, repealed, Pub. L. No. 94-412, 90 Stat. 1258 (1976), similarly contained a provision specifically making section 506 inapplicable to a certain class of war-related vessels. Section 9(d) of that act, 50 U.S.C. App. 1742(d), stated:

⁶⁵The text of subsection (c), the background of the legislation, and the fact that the legislation provided relief from section 506 requirements, are all contained in an agency legal opinion dated December 17, 1952 (A. 424-433).

"Section 506 of the Merchant Marine Act, 1936 as amended. . . shall not apply with respect to (1) any vessel which is eligible for an adjustment under this section, or (2) any vessel described in clauses (1)-(3), or (4) of subsection (a) of this section, the contract for the construction of which is made after September 2, 1945, and prior to the date of enactment of this Act."

3. Pending Legislation.

On July 12, 1979, Congressmen Murphy, McCloskey and Snyder submitted H.R. 4769 for consideration by the House of Representatives.⁶⁶ This massive piece of legislation, referred to as the "Omnibus Maritime Bill," proposes exhaustive revisions involving the entire body of existing maritime legislation, including extensive proposed revisions to the Merchant Marine Act, 1936. A number of these proposals, if implemented, would bring about fundamental changes in the present workings and underlying policies of the Act. Among these changes would be the amendment of Section 506 of Title V of the Act to remove the present prohibition against permanent participation in the U.S. domestic trade by a vessel built with CDS funds if the unamortized portion of the subsidy is repaid.⁶⁷

⁶⁶H. R. 4769, 96th Cong., 1st Sess. (1979).

⁶⁷The proposed amendment to section 506 would read:

"The owner of a vessel for which construction-differential subsidy has been paid shall agree that the vessel will be operated in international trade or the foreign commerce of the United States; except that the Secretary may consent in writing to the transfer of any vessel, for which construction-differential subsidy has been paid, to the domestic trade if the Secretary determines that such transfer is necessary or appropriate to carry out the purposes of this Act. If a vessel built with construction-differential subsidy is operated in the domestic trade, the owner of the vessel shall pay annually to the Secretary of

Whether or not section 506 will be amended as is currently proposed remains to be seen. That the bar against lifting permanent trade restrictions now *exists* in section 506, and that questions of removing that bar involve serious considerations relating to protection for the Jones Act fleet, however, were recognized by no less an authority than the Assistant Secretary for Maritime Affairs of the Department of Commerce, who testified:

"In another area, we support, with important reservations, the Bill's proposal to amend Section 506 and 605(a) of the Act to simplify the conditions under which vessels built with CDS and operated with ODS would be permitted, with pro rata payback of construction subsidy, and abatement of operating subsidy, to participate in the U.S. domestic trade. The proposed Section 506 amendment would *eliminate the existing six month per year limit on participation* by CDS-built ships in the Jones Act trade and the Section 605(a) amendment would broaden the conditions under which ODS ships might participate.

* * *

"Mr. Chairman, the owners of Jones Act ships, who have undertaken significant investment risk to assure the availability of shipping to meet U.S. domestic needs, deserve the strongest possible protection against any influx of ships built for the foreign trade with the advantage of construction subsidy. We believe the Bill should explicitly

Commerce that proportion of one twenty-fifth of the construction-differential subsidy paid for such vessel as the gross revenue derived from the domestic trade bears to the gross revenue derived from the entire voyages completed during the preceding year." H. R. 4769, *supra*, Sec. 302(6).

acknowledge the interests of the domestic operators and that it should contemplate the adoption of equitable regulations to govern the conditions under which subsidized ships might be permitted to enter the domestic trades."⁶⁸

The proposed changes in the Omnibus bill now pending show a congressional recognition that section 506 would require revision in order to allow the very agency actions defended here. The testimony of the Assistant Secretary shows that such revisions ought be addressed in the context of a thorough consideration, *by Congress*, of the implications of permitting subsidized vessels into Jones Act trades on a permanent basis.

C. Sections Other Than Section 506 Do Not Supply The Authority Not Conferred By Section 506.

Arguing that section 506 is "neutral" on the issue of whether the agency may lift the bar against use in domestic trades of a vessel built with CDS where the owner pays or promises to pay back the subsidy, petitioners must still find *some* authority conferred by the Act authorizing the Secretary to give funds for the purpose of building a ship for U.S. foreign commerce, whereupon the ban is automatically imposed, and then lift the ban upon repayment, or promise of repayment, of those funds. The authority is said to reside in the Secretary's "broad contractual powers" as evidenced by sections 207 (46 U.S.C. § 1117) and 504 (46 U.S.C. § 1154) of the Act. The citations to these sections as source for the authority betrays

⁶⁸Statement of Samuel B. Nemirow, Assistant Secretary for Maritime Affairs, Before the Merchant Marine Subcommittee of the House Merchant Marine and Fisheries Committee, on Titles III, IV and V of H R. 4769, pp. 28-29 (September 5, 1979) (footnotes omitted and emphasis supplied).

only the weakness of petitioners' claim that the authority exists were section 506 as irrelevant as claimed.

Section 207 states, in pertinent part:

"The Federal Maritime Commission and the Secretary of Commerce may enter into such contracts, upon behalf of the United States, and may make such disbursements as may, in its or his discretion, be necessary to carry on the activities authorized by this chapter, or to protect, preserve, or improve the collateral held by the Commission or Secretary to secure indebtedness, in the same manner that a private corporation may contract within the scope of the authority conferred by its charter."⁶⁹

The Government argues (Government Brief, pp. 50-51) that the waiver granted here was made for the express statutory purposes, protection and improvement of collateral. Yet both the Government and Seatrain ignore the phrase that gives meaning and definition to the authority conferred by section 207: the actions authorized to be taken for the purposes specified are co-extensive with actions that might be taken by a "private corporation . . . within the scope of the authority conferred by its charter." Section 207 authorizes the Secretary to exercise those powers ordinarily exercised by private companies. Private companies do not exercise governmental powers, and the waiving of a restriction imposed by statute is the exercise of a governmental, not a private power. The

⁶⁹In quoting this section, Seatrain omits the critical language "in the same manner that a private corporation may contract within the scope of the authority conferred by its charter." (Seatrain Brief, p. 21).

statute says that the Secretary's authority under section 207 to protect/preserve/improve collateral may be accomplished by entering into contracts and making disbursements in the same manner as would a private corporation. There is no suggestion that the purpose of protecting/preserving/improving collateral may be accomplished by regulatory action.

Moreover, the Government's suggestion (Government Brief, p. 63) that the simultaneous amendments to sections 506 and 207 of the Merchant Marine Act accomplished by Congress in 1938⁷⁰ show a consistent purpose to expand the waiver authority of the Secretary is refuted by the legislative history of the 1938 amendment to section 207. The Senate Report on the 1938 amendments noted that section 207, as enacted in 1936, originally provided:

"the Commission may enter into such contracts, upon behalf of the United States, as may, in its discretion, be necessary to carry on the activities authorized by this act, in the same manner that a private corporation may contract within the scope of the authority conferred by its charter." S. Rep. No. 1618, 75th Cong., 3d Sess. 4 (1938).

The 1938 amendment added a specific authorization to make disbursements, and added an alternative purpose to both the contracting and disbursement authority, namely the purpose to protect/preserve/improve collateral held by the Commission to secure indebtedness. The Senate Report which explained the purpose of the amendments stated:

"It is believed that such authority already exists in the Commission, but the amendment is recom-

⁷⁰For a discussion of the 1938 amendments to section 506, see *supra*, pp. 61-73.

mended in order to remove any doubt that the Commission possesses the power to advance or expend funds for such purposes where found necessary. Other Government lending agencies, such as the Reconstruction Finance Corporation, have such authority." *Id.* at 5.

Similarly, the House Report stated:

"The specific reference to the power of protecting and preserving the collateral mortgages, and so forth, held by the Commission is intended to make certain that the Commission possesses the power to advance or expend funds for the preservation of its collateral where found necessary or advisable. Such power has often been exercised by other Government lending agencies, such as the Reconstruction Finance Corporation. Without such authority the Commission may find it impossible to protect its mortgage or other interest in vessels, the title to which is in a transitory state, or where vessels are operated by the companies which are financially embarrassed when such vessels, because of accident or otherwise, need to be repaired or salvaged before further operation." H. Rep. No. 2168, 75th Cong., 3d Sess. 17 (1938).

The explanation in the House Report of the amendment to section 207 was taken almost verbatim from the statement which Chairman Joseph Kennedy made on December 2, 1937 during the House hearings (House Hearings on the 1938 Amendments, *supra*, at 4-5). Kennedy's remarks are consistent with the explanatory note to the amended version of section 207 which appears in the Senate Committee print of the Administration bill introduced by Senator Copeland on December 2, 1937:

"EXPLANATION — Section 207 grants to the Commission broad powers in connection with the administration of its affairs, powers which are as extensive as those possessed by the ordinary Government or private lending institution. *However, the broad grant of power, without specific particularization, may raise certain doubts as to the scope of the general grant. To remove such doubts and to simplify administration, these clarifying amendments are suggested.* The amendments are intended to be indicative rather than inclusive. *They do not grant new powers, but merely clarify and restate, in part only, those now existing.*

The specific reference to the power of preserving collateral is intended to assure the Commission that it possesses the power to advance or expend funds for the preservation of its collateral where found necessary or advisable. Such power has often been exercised by other Government lending agencies such as the R.F.C. Without such powers the Commission may find it impossible to protect its mortgage or other interests in vessels operated by financially embarrassed companies where such vessels, because of accident or otherwise, need to be repaired or salvaged before further operation." S. [un-numbered] 75th Cong., 2d Sess. (Committee Print of December 2, 1937) (emphasis added). (This committee print was later introduced as S.3078).

Further explanation of the purposes of section 207 as confirming the Secretary's power to contract and make disbursements in order to protect collateral in the same manner as does a private corporation is found in an exten-

sive dialogue between members of the Senate Commerce Committee and Chairman Kennedy, along with his General Counsel Max O'Rell Truitt, wherein Mr. Kennedy explained that in order to protect the Government's collateral, tied up in vessels whose owners were in bankruptcy or receivership, the agency needed to keep the vessels operating in order to protect its financial position.⁷¹

Both a literal reading of section 207 and an examination into its legislative history make clear that that section does not speak to any governmental powers that the Commission may have.⁷² It was for that reason that the court below

⁷¹Proposed Amendments To Merchant Marine Act, 1936: Hearings on S. 3078, 75th Cong., 3d Sess. 1157-1158 (1938).

Both Mr. Kennedy and Mr. Truitt explained that the only purpose of this amendment confirming the power to make disbursements and confirming that contractual and disbursement power could be exercised to protect collateral to secure indebtedness was to enable the Commission to operate as does a private corporation which forecloses on property. As stated by Mr. Kennedy:

"So, while we were foreclosing the property, and had that as collateral, we would like then to be able to go onto those ships and comply with the requirements of the Department under the law and maintain them and run them. That was the only real purpose in having that in here."

And as stated by Mr. Truitt:

"We think that under the present statute we have the right to do those things, but we are sure that if we did them we would be seriously questioned by the Comptroller General. To remove that possibility and to give us a clear right to protect the property on which we have a mortgage, so that we can run it during the period of foreclosure, we think this language ought to be put in to enable us to make such disbursements to protect ourselves or to improve the collateral held by the Commission." Hearings on S. 3078, *supra*, at 1157-1158 (emphasis added).

⁷²Similarly, in the only judicial decision speaking to the Commission's powers under section 207, *Dollar v. Land*, 82 F. Supp. 919 (D.D.C. 1948), *rev'd.*, 184 F.2d 245 (D.C. Cir. 1950), *cert. denied*, 344

correctly found that section 207 is "what is commonly called a 'housekeeping statute,' and a similar provision is found in nearly every administrative agency basic statute" (Pet. App. 41-a-42a) and concluded that: "§ 207 cannot be a foundation of Agency power . . . to exercise any power not otherwise granted in the Act or other statute." (Pet. App. 43a).⁷³

Petitioners' only other statutory source of authority to change mind, mid-stream, about the trades in which vessels built with CDS may be employed, aside from general references to "broad contractual powers" and the inferences that may be drawn therefrom,⁷⁴ is Seatrain's reference to section 504 of the Act and specifically the language in section 504 which provides that the contracts reflecting the transaction "shall not restrict the lawful or proper use or operation of the vessel, except to the extent expressly required by law." 46 U.S.C. § 1154. Seatrain argues that the subsidy contract therefore can not restrict the vessel's permanent operation in domestic trades after subsidy is repaid.

U.S. 806 (1952), that section was interpreted as relating only to the agency's authority to operate as a private corporation, not to its governmental authority.

⁷³In petitioners' original attempt to secure the necessary governmental authorization for its three-year charter of the STUYVESANT to Sohio, filed under the regulations implementing section 506, *see supra*, pp. 13-14, petitioners relied upon section 207 as overriding the restrictions of 506, which latter section it admitted conflicted with its interpretation of section 207 (Pet. App. 10a n. 17). The agency's lack of confidence that the broad powers of section 207 would override the explicit commands of section 506 is shown by its failure to approve that application, opting for the "waiver upon promise to repay CDS" route, accomplished even before any notice was given that the proceeding instituted in response to this three-year application was terminated.

⁷⁴The Government brief, while reiterating the "broad contractual powers" theme, cites only to section 207 as the statute conferring Secretarial power to waive the 506 restriction upon use in domestic

Congress rejected Seatrain's reading of section 504 by explaining that this last sentence of section 504, added by amendment in 1951, was intended to restrict the operation of CDS-built vessels *specifically to those trades permitted by section 506*. Congress said, in both the House and Senate Committee Reports:

" 'Subject to the exceptions contained in section 506 of the 1936 act as to use in domestic trades, sections 1 and 4 [of the amendments] . . . provide that the lawful or proper use of a vessel constructed with . . . [construction-differential subsidy] may not be restricted.' " S. Rep. No. 295, 82d Cong., 1st Sess. 4 (1951); H. R. Rep. No. 2221, 82d Cong., 2d Sess. 25 (1952), quoted in the opinion below (Pet. App. 40a n. 102) (court's emphasis).

Thus Congress did not think section 506 neutral, as do petitioners, on the issue of what contractual rights the Secretary must insist upon in contracts with CDS recipients.

trade. (Government Brief, pp. 50-51, 63, 73) The Government additionally cites to judicial authorities for the proposition that the power to contract includes the power to rescind or amend contracts, but then concedes that such lesser powers are subject to congressional limitation (Government Brief, p. 49). Such general propositions do not further analysis here, because clearly if the amendment of a contract results in a new arrangement which the Secretary would not have had power to make in the first place, authority cannot be self-generated under the "power to amend" concept. Since the Government registers considerable doubt, p. 54 & n. 60, as to whether the Secretary could pay CDS for the construction of a vessel for foreign trade, with the understanding that the recipient could pay back the subsidy and employ the ship in domestic trade, the Government's argument that the power to grant subsidy necessarily subsumes the power to take it back is contradictory.

Congress plainly addressed, in section 506, the issue of permissible use for vessels built with CDS for the purpose of serving the *foreign* commerce of the United States. No other sections detract from that congressional delineation of those uses or add additional permissible uses.

D. No Deference Is Due To The Interpretation Of The Act Made By The Secretary With Respect To Waiving The Bar For The STUYVESANT.

1. To Qualify For Judicial Deference, Administrative Interpretations Must Satisfy Threshold Requirements.

Petitioners support their request for judicial deference to the agency's interpretation of its powers by contending that such interpretation was both longstanding and consistent.⁷⁵ While we show below that the interpretation was neither, this Court has plainly taught that even compliance with that standard will not convince the judiciary to recede from its role of being the final arbiter of the limits of administrative power.⁷⁶ As this Court stated in *FMC v.*

⁷⁵Government Brief, pp. 64-66; Seatrain Brief, pp. 50-51.

⁷⁶That administrative interpretations are not conclusive or binding upon the courts, but constitute only "one input in the interpretational equation" *Zuber v. Allen*, 396 U.S. 168, 192 (1969), which the courts execute in their role as the "final authorities on issues of statutory construction" *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965) is clear. In carrying out that function, the reviewing courts:

" 'are not obliged to stand aside and rubber-stamp their affirmation of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.' *NLRB v. Brown*, 380 U.S. 278, 291 [1965]." *Volkswagenwerk Aktiengesellschaft v. FMC*, 390 U.S. 261, 272 (1968).

See also *SEC v. Sloan*, 436 U.S. 103, *supra*, 110-114; *Morton v. Ruiz*, 415 U.S. 199, 237 (1974); *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 94-95 (1973); *Zuber v. Allen*, *supra*, 396 U.S. at 193.

Seatrains Lines, Inc., 411 U.S. 726, 745 (1973) “. . . an agency may not bootstrap itself into an area in which it has no jurisdiction by repeatedly violating its statutory mandate.”

Moreover, the threshold requirements of continuity and consistency are not sufficient to obtain the deference which petitioners so earnestly seek (and need) in this case. The degree of deference accorded to administrative interpretations:

“will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”

Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

The importance of a thorough administrative consideration of agency powers, prior to attempting their exercise, was explained in *SEC v. Sloan*, *supra*, 436 U.S. 103, wherein this Court, having been urged to pay deference to an agency interpretation, pointed out that the agency had not “actually addressed in any detail the statutory authorization under which it acted” and that the agency’s action “without a concomitant exegesis of the statutory authority for doing so, obviously lacks ‘power to persuade’ as to the existence of such authority.” 436 U.S. at 118, citing *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 287-288 n. 5 (1978).

The importance of the element of contemporaneity with respect to the quantum of deference to be paid has also been stressed by this Court. As stated by Justice Harlan in *Zuber v. Allen*, *supra*, 396 U.S. at 192, an administrative construction:

“carries most weight when the administrators participated in drafting and directly made known their views to Congress in Committee hearings. . . In such circumstances, absent any indication that Congress differed with the responsible department, a court should resolve any ambiguity in favor of the administrative construction, if such construction enhances the general purposes and policies underlying the legislation.” (Citations omitted).

Relying on *Zuber*, the Court in *Sloan*, *supra*, rejected the agency’s urgings that its interpretation of the statute was contemporaneous in nature and therefore entitled to judicial deference.⁷⁷

This case is a classic illustration of the need for judicial scrutiny of the bounds of authority conferred by Congress on administrative agencies. The agency meets none of the standards required for deference. As to careful consideration and articulation of the source of the claimed powers, the agency here issued *no*, much less a well-reasoned, interpretation of the Act, but merely collected those rationalizations available to support its interpretation when confronted with a judicial challenge. As to con-

⁷⁷In *Sloan*, the Court said:

“Here the administrators, so far as we are advised, made no reference at all to their present construction of § 12(k) to the Congress which drafted the ‘enabling legislation’ here in question — the Securities Exchange Act of 1934. They made known to at least one committee their subsequent construction of that section 29 years later, at a time when the attention of the committee and of the Congress was focused on issues not directly related to the one presently before the Court.” 436 U.S. at 120.

The circumstances of the *Sloan* case are virtually identical to this case and its reasoning directly on point.

temporaneity, the agency and its predecessor agencies did not issue any interpretation of the Act which would support petitioners' position here until over 25 years after section 506 was enacted in its present form. As to consistency, the interpretation rendered for the Grace Line vessels is inconsistent with the agency interpretation offered in this case; the other agency actions urged to show consistency all were taken within two years prior to this litigation, all are conditional and none comparable; no agency regulations support its present interpretation, and current regulations are inconsistent with that interpretation; moreover, contractual implementation of the CDS program is inconsistent with that interpretation.

A study of the agency record shows that the statutory interpretation urged here was adopted to secure one result in 1977: protection of government funds at risk because of governmental decisions to extend financial aid to a private operator for a venture that was not going to be, and perhaps never could have been, successful. Judicial intervention, not deference, is required here to keep an agency within the bounds of its legislative mandate which bad governmental judgments have tempted it to exceed.

2. The Agency's Interpretation Of Its Powers Was Wholly Opportunistic; It Was Not Even Stated, Much Less Well-Reasoned Or Articulated.

The agency has continuously sought to bend the rules for the Seatrain endeavor (*supra*, pp. 3-15). When Seatrain first sought to accomplish the three-year charter to Sohio, it did so not by "re-tendering" the subsidy monies, but by requesting permission for that charter under section 506 of the Act. That application, filed July 8, 1977 (A. 18-33), was docketed by the agency as an ap-

plication filed under Part 250 of its regulations which established specific procedures for entry of subsidized vessels into the Alaskan oil trade. But these very regulations *prohibited* the approval of an application which would result in longer participation than six months in any consecutive 12-month period. Instead of rejecting this application out-of-hand, it was docketed by the agency under Part 250 (Maritime Administration Docket S-565), noticed in the *Federal Register*, and comments were invited (Pet. App. 70a). The barrage of protests against the apparently intended blatant violation of section 506 resulted in the arrangement under review here, announced by a Press Release (A. 77-78) and accomplished by two letters dated August 31, 1977 from the agency to petitioners (A. 66-76).

The first of these letters sets forth the reasons for the agency's interpretation that its statutory powers permit it to authorize permanent domestic trading for the CDS-built STUYVESANT. The letter begins:

"For over two years the Maritime Administration has been considering the possibility that at the time of delivery there might be no market for the STUYVESANT other than the movement of Alaskan oil to the lower 48 states." (A. 66).

The letter then refers to the substantial Government assistance rendered by the agency's sister agency, the Economic Development Agency, and states that "several years of work and negotiations have generated no other opportunities for employment of this vessel" (*Id.*). The reasons given for exercise of the claimed waiver power, *in full*, are:

"[The agency is] persuaded that approval of the proposed CDS repayment and the time charter of

the Sohio Petroleum Company will improve the collateral position and prevent possible default on various obligations insured and guaranteed by the Department of Commerce, and failure to approve the proposal would jeopardize continued operation of the Seatrain Shipbuilding Corporation," (A. 66).

This statement contains *no* interpretation, *no* reasoned analysis. None of the *post hoc* rationalizations offered to this Court, *e.g.*, the alleged interplay between sections 506 and other sections of the Act, the intentions of the Congress that passed section 506, of predecessor and later congresses, of legislative intent behind the non-enactment of legislation — nothing is said about *the statute*. The two reasons given on August 31, 1977 remain the real reasons for the agency's actions: protection of both petitioners' and the Government's financial position. Such reasons do not constitute the kind of thoughtful, well-reasoned interpretation of a statute to which this Court must pay deference in seeking to determine congressional intent.

3. The Agency Interpretation Of Its Powers Was Not Contemporaneous.

Petitioners concede (Government Brief, p. 65; Seatrain Brief, p. 51) that the first exercise of this asserted power was in 1964, some 26 years after section 506 was rewritten in the terms in which it stands today.⁷⁸ The *first* official in-

⁷⁸The Commission first addressed the problem of CDS repayment in 1942 by issuance of its General Order 50, 46 C.F.R. § 276 (1944 Cumulative Supplement to the 1938 Code of Federal Regulations, pp. 11229-11230). These regulations prescribe the time for repayment of CDS for any CDS-built vessel "operated in other than exclusive foreign trade," and contained reporting requirements as well. No provision is made for repayment of unamortized subsidy as "consideration" for lifting a statutory bar.

terpretation of the power claimed here appeared in a Notice of Proposed Rulemaking issued *October 25, 1978*, 43 Fed. Reg. 51045 (November 2, 1978) which purported to establish regulations governing the conditions upon which the agency would waive the restrictions against permanent operation of vessels built with CDS. Those regulations were issued in response to the decision of the District Court here which, although sanctioning the waiver for the STUYVESANT, demonstrated concern that the agency had issued no regulations to guide the public in regard to the exercise of the claimed powers.⁷⁹ These proposed regulations have been neither promulgated nor withdrawn, the agency apparently awaiting final disposition of this case.

4. The Agency Interpretation Of Its Power Was Not Consistent.

Since 1936, when the CDS program was instituted, there has been only one instance, other than the instant case, in which the agency accepted repayment of subsidy in order to permit vessels to operate in domestic trade.

⁷⁹Pet. App. 88a-89a. The district court held that the Secretary's failure to publish regulations did not violate 5 U.S.C. 552(a)(1) as interpreted by this Court in *Morton v. Ruiz*, 415 U.S. 199 (1974). The lower court characterized that decision as employing "some extraordinary far-reaching language" (Pet. App. 87a) but nevertheless stated that:

" . . . the Secretary should, as a matter of sound policy, establish guidelines and procedures of general applicability to govern CDS repayment and permanent waivers of domestic trading restrictions. The Court is unpersuaded that there is any compelling reason for the Secretary to make determinations on applications such as that concerning the STUYVESANT on an *ad hoc* basis . . . The Court is confident that the Secretary will give these concerns regarding the need for appropriate regulations her most serious consideration." *Id.* at 89a.

This was in 1964 when Grace Line asked the agency to amend its CDS contracts with respect to the SS SANTA ELIANA and the SS SANTA LEONOR to release the vessels to operate in domestic trades. Although these vessels had been built in U.S. yards without subsidy and had therefore initially qualified for the Jones Act trades, they had been reconverted with the aid of CDS so that section 506 prohibitions were later attached. So far as is known, the request was unopposed; nevertheless, the agency, on its own, asked the Comptroller General for an opinion as to whether it had the authority to waive *the restrictions of section 506*, enclosing an agency General Counsel's Memorandum Opinion which purported to analyze the statute and to find authority therein for the requested waiver. The Comptroller General issued an opinion which tracks *almost word for word* the General Counsel's Memorandum. *Compare* Opinion of the Comptroller General, B-155039, 44 Comp. Gen. 180 (September 30, 1964) (A. 172-180) with Maritime Administration Acting General Counsel's Memorandum (A. 350-358).

In discussing the "deference" that should be paid to the single administrative interpretation of the agency powers, issued 26 years after the enactment of the statute, the Court below stressed that the action taken for the Grace Line vessels was unopposed, not judicially tested, not binding on the judiciary, and most importantly, inconsistent with the statutory interpretation issued here (Pet. App. 31a-32a). In 1964, the agency sought confirmation of its asserted authority to waive the restrictions of section 506 (A. 172), whereas petitioners here urge that section 506 is not a bar. The Comptroller General's Opinion (which in reality was nothing more than a restatement of the agency General Counsel's Opinion) obliged, reasoning that authority to accept total CDS payback as a *quid pro quo* for release of the statutory bar stemmed from the

agency's powers as contained *in section 506*. That interpretation was reached as follows: (1) by assuming that a temporary use of the vessel after 25 years would not require any proportionate payback of subsidy; (2) by then assuming that the vessel was free to ply the domestic trades after 25 years; and (3) by then concluding that the 25 year period could be shortened by repayment of the unamortized amount of the subsidy. Thus the interpretation was expressly based on the agency's power under section 506. As the Court below noted, the agency interpretation here is directly contrary to the interpretation originally offered to support the Grace Line action: here the agency finds it best argument to be that section 506 does not preclude the actions taken, and the power is found in its general contractual authorization; for Grace Line the agency said that section 506 authorized a foreshortening of the bar.⁸⁰

Three other instances of alleged waiver were cited by petitioners (Government Brief, p. 66; Seatrain Brief, pp.

⁸⁰It is understandable why the agency has decided to find reasons other than those urged in the Comptroller General's Opinion on the Grace Line vessels (and urged by the agency in its request for that opinion) to support the argument that it possesses the challenged power. The Act is silent as to whether proportionate payback is required at the end of a vessel's useful life when engaging in temporary domestic trade; the legislative history of the non-enacted 1963 amendment can be read as supporting the interpretation that proportionate payment requirements cease only for incidental domestic trading, not temporary domestic trading, when the statutory life expires. *See supra*, pp. 75-77 & n. 53. But even if the obligation to repay part of the subsidy when engaging in temporary trading does cease after 25 years, the conclusion that the bar against unrestricted domestic trading is automatically lifted is contrary to the language of the statute, *see supra*, p. 52, and is contradicted by the standard contract the agency offers to CDS operators, *see infra*, pp. 105-106. Finally, even if the words of the statute commanding obedience in perpetuity were judicially narrowed to a useful life period, there would be *no* reason to imply that the bar *during* that useful life could be waived.

54-55) in an effort to support the adjectives "longstanding" and "consistent." Since all three actions were taken within the period December 1976-August 1977 (A. 165), the "longstanding" tag hardly applies. Nor were these actions "consistent" in terms of lifting the bar against permanent domestic trading for CDS-built vessels. In the first two cases, the agency purported to permit CDS repayment "in the event that the Virgin Islands trade became domestic trade at some future date" (A. 165).⁸¹ Thus no repayment has been either tendered or accepted. Such tender and acceptance is a condition of a contract which will come into play, *if at all*, only upon the enactment of a statute which is not on the books. As noted by the Court below, the purported waivers for these vessels were "conditional," "restricted," "as yet unexercised," and therefore not an instance of agency action waiving the bar.⁸² The other "instance" of waiver was also conditional, unexercised, and not analogous to the waiver involved here (Pet. App. 35a). The waiver was to permit two liquid natural gas vessels to trade in foreign-to-foreign commerce (A. 165) which is included within the definition of foreign trade in section 506 in respect of such vessels.⁸³ The only

⁸¹The purported waiver specifically barred these vessels from entering the Alaskan oil trade (A. 165).

⁸²Pet. App. 34a-35a & n. 82. The Court below characterized these conditional waivers as "an end-run around the domestic use proscriptions of § 506 . . . even under the anomalous and potentially variable circumstances of the Virgin Islands trade" (*Id.* at n. 82).

⁸³Section 905(a) of the Act defines foreign trade as between U.S. and foreign countries except, "in the context of Title V of this Act concerning construction-differential subsidy," foreign trade includes, for "liquid and dry bulk cargo carrying services," foreign-to-foreign trade in such instances as the Secretary may by regulation permit. 46 U.S.C. 1244(a). The text of section 905(a) is set forth in the appendix to this brief. Thus the Secretary may grant CDS for foreign-to-foreign tanker vessels and there is no section 506 bar.

administrative interpretation of the Act rendered by the agency as a purported exercise of the alleged waiver authority, other than this case, is the waiver granted in 1964 for the Grace Line vessels based upon a statutory interpretation rejected by petitioners here.

Events on the regulatory side of the administrative ledger betray still further inconsistencies. The agency was cognizant of the fact that the development of the Alaskan oil fields might require additional U.S. flag tonnage and consequently issued specific guidelines for filing applications for serving that specific trade with CDS-built ships. Those regulations, 46 C.F.R. Part 250, state that

"the Assistant Secretary shall not approve an application where the result would be to allow a vessel of the applicant to participate in the trade for a period exceeding six months in any consecutive 12-month period, commencing with the entry date of the applicant's vessel for the carriage of Alaskan oil in the Alaska-Panama Canal trade." 46 C.F.R. § 250.5.

Further, the agency's exercise of its *contractual* powers is totally inconsistent with the interpretation needed to waive the STUYVESANT into the domestic trades. The standard subsidy contract tendered by the agency (and the one executed as between the agency and Seatrain) provides, in Article 9B, that "Purchaser hereby agrees, in accordance with section 506 of the Act, that the Vessel shall be operated exclusively in foreign trade, or on a round-the-world voyage, or on . . . [incidental domestic commerce], and that if the Vessel is operated in . . . [incidental domestic trade], Purchaser will pay annually . . . [proportionate subsidy repayment]; and (ii) Purchaser agrees to comply in all other respects with section 506 of the Act."

(A. 497-498). Subsection D of the same article provides: "*The foregoing provisions of this Article shall run with the title to the Vessel and be binding on all owners thereof.*" (A. 498) (emphasis supplied). These contractual provisions show that the agency consistently, *and in this case*, deemed the section 506 restrictions to be *permanent*. They show further that the agency did *not* think such restrictions expired with the statutory useful life of the vessel (which was the predicate for its action in the Grace Line matter and for the argument urged here that the restrictions of section 506 are dependent only upon the continued retention by the purchaser of CDS).

Finally, the memorandum cited *supra*, pp. 9-10, from the Chief of the Office of Subsidy Administration to the Maritime Administrator showed that the Chief of the Subsidy division vigorously rejected the contention that the agency needed the "flexibility" to waive vessels built with subsidy into the Jones Act fleet; that official asserted that such a waiver was barred by section 506.

The request by petitioners for judicial deference to agency interpretation in this case would make a mockery of the doctrine designed to keep a proper balance between these two governmental branches. Indeed, the role of the judiciary in a case where an agency seeks to achieve a result designed to protect *its* position, rather than impartially implement congressional objectives, is quite other than deferential:

"[T]he deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress." *American Shipbuilding Co. v. NLRB*, 380 U.S. 300, 318 (1965).

III. THE WAIVER FOR THE STUYVESANT WAS ALSO INVALID AS AN UNAUTHORIZED LOAN FROM THE UNITED STATES GOVERNMENT TO A PRIVATE PARTY.

Petitioners speak throughout their briefs as if the \$27.2 million of subsidy paid for the STUYVESANT "has been repaid."⁸⁴ The facts are, however, that the application submitted by petitioners and accepted by the agency was not to repay the subsidy but to execute "a 20-year promissory note payable in 40 semiannual installments as reimbursement of the amount of the subsidy and other monies advanced by the Government." (Pet. App. 11a). We argued to the courts below that even assuming, *arguendo*, the statute permitted waiver of the section 506 restrictions upon repayment of subsidy, a promise to repay did not trigger the implied authority. The district court rejected that argument, stating: ". . . it would be patently inconsistent with the far-reaching nature of the Act's statutory scheme to interpret the Secretary's authority in an unnecessarily restrictive manner," (Pet. App. 84a). The court of appeals never reached the issue, holding the Secretarial lifting of the bar to be beyond her statutory powers. The issue becomes relevant, however, if petitioners' interpretation of the Act is approved here.

Section 509 of the Act permits the agency to make loans for the construction of vessels, but the conditions for making such loans were not met here, nor could they be, as section 509 prohibits, *inter alia*, the granting of loans when construction-differential subsidy is allowed. 46 U.S.C. § 1159. The Act confers no other loan authority, and, being silent on the subject of CDS payback and permanent waiver of section 506 restrictions, it obviously

⁸⁴See especially the Government's Statement of Questions Presented (Government Brief, p. 2; see also Government Brief, pp. 52-53; Seatrain Brief, pp. 29, 68).

contains no provision relating to the method of total repayment.⁸⁵ Petitioners claimed below that this silence gave the Secretary of Commerce the widest latitude, and that no restrictions on the "form" of payment could be read into the Act. But if, as petitioners contend, the reason that repayment of subsidy does not evade the prohibitions of section 506 is because that section "is concerned solely with the extent and conditions of competition between the unsubsidized domestic fleet and *ships that continue to enjoy the benefits of CDS financing*" (Government Brief, p. 52), clearly the "form" of repayment, cash or promise, is highly relevant.

It is clear from the most everyday experience that a cash payback of subsidy and a promise to repay subsidy over 20 years are completely different transactions. In the first case the Government has its money in hand, and is therefore not subject to continuing financial risks depending upon the economic well-being of the vessel owner. The shipowner has not had the use of Government funds while engaging in the domestic trades, and the shipowner's competitors are not competing against a vessel whose cost is commensurate with the cost of vessels built in foreign yards. In the second case, the Government does not have its cash, and whether or not it will ever be repaid depends upon the unforeseeable vicissitudes of commercial life during the next 20 years. The shipowner has the use of Government funds for virtually the entire economic life of its vessel. Furthermore the shipowner's competitors are faced with competition from a vessel

⁸⁵By contrast, when the statute might be read to have allowed such repayment, in 1936, it was not so silent. Thus the 1936 Act provided for repayment "upon such terms and conditions as the Commission may prescribe", and predecessor bills required repayment "prior to" the operation of the vessel in domestic trades. See *supra*, pp. 58-61.

whose cost was equivalent to that of vessels built in foreign yards, with cost "equalization" coming about in small doses over an extended period. Indeed, the Government concedes this difference when it speaks to the differing competitive positions of subsidized and unsubsidized tankers, where the subsidized tanker plies the domestic trade for the permitted six-month period, but repays on a prorata basis, the subsidy received. As the Government says, such prorata payment "cannot eliminate entirely the significant financial advantage held by a ship that still retains the benefit of a federal subsidy, because of the subsidized ship's overall smaller indebtedness." (Government Brief, p. 52).

Even if, however, there were some way, which there is not, to ensure that Polk Tanker's operations will be viable enough for the next 20 years to permit the promised subsidy repayment, under petitioners' theory of the Secretarial powers such repayment is not an ironclad, non-waivable obligation. Under petitioners' theory, the Secretary possesses authority to amend and terminate contractual obligations, restricted only to those amendments or terminations which are not "expressly" prohibited by law. Since the statute is silent on the issue of subsidy repayment, and thus on the issue of the terms and form of subsidy repayment, it is likewise silent on the issue of cancellation of obligations to repay subsidy. Thus the Secretary could, under petitioners' interpretation of the Act, cancel the notes upon a finding, for example, that the STUYVESANT could be put to better use in the foreign trades than in the domestic trades. Thus the "loan" authority, which petitioners claim is merely a matter of form, rather than of substance, becomes a method of avoiding the six-month limitation on temporary transfer of CDS-built vessels in the domestic trades.

Whether or not the Government here has a present intention to utilize that method is not critical;⁸⁶ the point is that under petitioners' theory, there can be no statutory restriction of the Secretary's authority to continuously amend subsidy contracts while loans are being repaid, so as to abate the loan and renew the subsidy contract for the remaining economic life of the vessel.

That acceptance of a 20-year promissory note is equivalent to a cash loan by the agency to Seatrain and Polk cannot seriously be disputed. Petitioners, however, have continuously failed to cite any statutory authority whereby the agency may make loans for vessels being built for foreign trades under the form of subsidy grant, and then permit rededication to domestic trade, and repayment over the statutory life of the vessel. The Black Report⁸⁷ stated:

"The present system of construction loans should be abolished, but the ship operators should be free to borrow from governmental agencies (*other than the U.S. Shipping Board, whose power to make loans should be abolished*) upon equal terms and conditions with other private enterprise."⁸⁸

⁸⁶Below, Government counsel pledged that this obligation would not be cancelled by the Secretary. Brief for the Federal Parties in the court of appeals in No. 77-2080 *et al.*, p. 37 n. 26. Such a pledge, whether or not binding upon future Secretaries during the next 20 years, is inconsistent with the Government's theory that the power to accept subsidy repayment inheres in the power to amend subsidy contracts except where such amendments are "expressly" restricted by law.

⁸⁷S. Rep. No. 898, 74th Cong. 1st Sess. (1935). The report is cited by Seatrain, correctly, as the source for the 1936 overhaul of aids to the U.S. Merchant Marine. Except for section 509 of the Act, inapplicable to CDS-built vessels, the loan power was abolished.

⁸⁸*Id.* at 44 (emphasis supplied).

That the authority to draw upon the United States Treasury is not to be lightly implied was established at least as far back as 1851 when this Court denied a writ to compel payment of a debt due from the United States in the absence of a congressional appropriation (*Reeside v. Walker*, 11 How. 272, 13 L.Ed. 693 (1851)). In that case, the Court said: "It is a well known constitutional provision, that no money can be taken or drawn from the treasury except under an appropriation by Congress. See Constitution, art. 1, sec. 9, 1 Stat. at Large, 15." 11 How. at 291. And in *United States v. MacCollom*, 426 U.S. 317, 321 (1976), this Court, citing *Reeside v. Walker*, said:

"Where Congress has addressed the subject as it has here, and authorized expenditures where a condition is met, the clear implication is that where the condition is not met, the expenditure is not authorized."

As in *MacCollom*, Congress here has addressed the subject of loans by the agency, in section 509 of the Act, and the conditions for obtaining such loans have not been met. The conclusion is that the expenditure is not authorized.

Interestingly, petitioners' defense of the loan transaction has been singularly bereft of resort to the "aids" it used when seeking to persuade the judiciary that Congress intended the Secretary to waive section 506 restrictions in the first place. Thus petitioners do no claim that Congress intended the agency to make loans, or that the agency has continuously interpreted its "waiver" powers to include the lending function. The reason that petitioners can cite to no such "consistent" administrative interpretation of the Act is that the one instance in which the agency *did* waive section 506 restrictions in the 40 years in which it has administered this Act, for the Grace Line vessels, the agency *disclaimed* the power to accept repayment over time. Thus Grace Line requested that it be allowed to repay the sub-

sidy over time, and the agency then said:

"You are advised that consideration was given to the repayment proposal as outlined in your letter of June 15, 1964. However, the 1936 Act apparently did not contemplate the acceptance of notes in favor of the Government in a transaction of this nature involving the financing of a vessel for operation in the domestic trade of the United States." (A. 364-365).

Petitioners' defenses to the argument that the Government lacks power to lend money to Seatrain in the form of acceptance of a promissory note for the repayment of a subsidy have varied as the case has progressed. To the district court, the sole defense tendered was that a promise to pay is the same as payment under the Uniform Commercial Code § 3-302.⁸⁹ In the court of appeals, the Government argued that the agency possesses power to loan money for the building of vessels under section 509 of the Act. But section 509 applies where a purchaser pays a specified part of the cost to the agency in advance, and specifically states that "[n]o construction-differential subsidy shall be allowed" with respect to a vessel built under that section. The STUYVESANT was not built under section 509.⁹⁰

⁸⁹The cited section applies only to situations wherein "an instrument" is taken for an underlying obligation and "instrument" is defined as a negotiable instrument. Uniform Commercial Code § 3-102(1)(e). The Uniform Commercial Code does not give any support for the desperate proposition that payment and a promise to pay over 20 years is the same thing.

⁹⁰The Government and Seatrain also argued to the court below that if waiver were permitted upon repayment, the agency could have guaranteed the loan whereby Seatrain secured the cash for repayment under section 1104(a)(3) of the Act. Assuming again, *arguendo*, that 1104(a)(3) applied to this repayment because of the Secretary's sup-

Seatrain argued to the court below that the Secretary's decision on remand, following the district court's direction that the waiver authority be exercised only upon a consideration of competitive effect, is a full answer to the issue tendered here, because the Secretary found no competitive effect based upon payment over time compared to immediate cash prepayment. This defense mistakes the nature of the claim, which is that under the Act the agency *lacks power* to make loans. Whether or not a particular loan has a "competitive effect" would be germane *if* the Act entrusted the agency with loan-making authority to be exercised upon findings relating to competitive effect.

The various challenges and defenses as to the terms and conditions upon which loans should be made, the similarity of loans to Title XI guarantees, the test of competitive effect as applied to exercise of the loan authority, all underscore the silence of the Act on the issue. The conclusion follows that loan power in the form of payment over time for subsidy repayment is beyond agency authority. As with the issue of agency power to permanently release vessels purchasers from the restrictions section of 506, Congress' silence is deafening. It should be respected.

posed inherent power to accept such repayment, this is not what the agency did. To say that Title XI of the Act, which provides for Government *guarantees* of loans, authorizes the Government to *make* such loans is to totally rewrite the statute.

IV. THE PURPOSES AND POLICIES OF THE MERCHANT MARINE ACT, 1936, ARE SERVED BY RESPECTING CONGRESSIONAL INTENT TO DENY CDS ASSISTANCE FOR VESSELS PERMANENTLY DEDICATED TO THE DOMESTIC TRADES.

The broad purposes of the Merchant Marine Act, 1936, are to foster the development and encourage the maintenance of a Merchant Marine sufficient to carry the commerce of the United States and capable of serving the nation's needs in time of war or national emergency (Section 101 of the Merchant Marine Act, 1936, 46 U.S.C. § 1101). Achievement of those objectives in a framework including Government aids requires certainty about the Government's role in respect of all of the industrial components of the merchant marine industry — the shipyards, the ship purchasers, the ship charterers, the ship operators. The magnitude of the investment required and the volatility of the market, as shown by this record, speak eloquently of the necessity for assuring investors that while the predictability of economic forces eludes the grasp of even the most sophisticated prognosticators, at least the governmental role has boundaries. Petitioners' plea that Secretarial discretion encompass the ability to waive ships built with subsidy for the foreign trade into the domestic trade whenever the domestic market is strong and the foreign market weak and government loan guarantees are at risk will destroy the foundations upon which huge sums have been invested by entrepreneurs willing to trust their judgment of market forces without reliance on taxpayer funds.⁹¹

⁹¹The argument offered by petitioners (Seatrains Brief, pp. 72-73; Government Brief, pp. 74-75) that the industry has been on notice since the Grace Line situation that the subsidized fleet could be waived into the Jones Act trades is disingenuous, and the evidence cited un-supportive. The Grace Line situation was viewed by the industry, as

A decision to invest the enormous sums of money required for tanker construction in a U.S. yard in order to acquire vessels uniquely eligible for operation in the domestic trades will not be made unless there is as much certainty as the market allows about the vessel's prospects for employment. The agency action would establish the principle that vessels now serving in foreign trades, which were built in U.S. yards with CDS, *might* have trading restrictions waived and thus be permanently allowed to operate in the domestic trades. Which ships, how many ships, when, under what circumstances — all these questions would be matters left, if petitioners' position were adopted, to agency discretion to be decided according to the circumstances of each particular case. Such action would make economic planning impossible, which means that decisions to invest in unsubsidized ship construction would not be made. The certain knowledge at any given point in time as to which ships have been built without CDS, and are thus eligible for Jones Act trades, which ships are CDS-built and hence not, which ships are being

by Congress, as "unique," and until the actions challenged here, never repeated. The agency has never given public notice that it intended to "implement" its statutory goals by establishing a program or setting standards whereby such waivers would be made; consequently the probability thereof would not be factored by the industry. The statement of Mr. Reynolds in 1972 (quoted in Seatrain Brief, p. 73; cited in Government Brief, p. 75) did not bless, but instead merely *described*, a bill that was never enacted — the amendment to 46 U.S.C. § 1104 (a)(3) (*see supra*, p. 78-82). Moreover, the statement of the committee chairman (Seatrains Brief, p. 73) to the effect that the bill was not "controversial" was contained in a lead-off statement describing all of the amendments upon which hearings were to be held. It preceded by 32 pages the testimony of Mr. Reynolds, and in no way can be seen as an accurate reflection of industry views on the un-enacted provision. *See Proposed Amendments to Merchant Marine Act, 1936: Hearings on H.R. 9756 Before the House Committee on Merchant Marine and Fisheries, 92d Cong., 1st Sess. at 193 & 225 (1971).*

built with and without CDS, all of these factors provide encouragement to the free, capital market. Given, however, the lead years of construction and the volatility of the business market, the added uncertainty which petitioners seek to impose herein — the entry, upon waiver, of the huge tonnage represented by subsidized ships built years ago when construction costs were a fraction of those that investors must now face — would lead, by the most elemental of logic, to a severe inhibition on the building and purchase of vessels dedicated to the Jones Act trades.

The snowball effect of such an inhibition is apparent. The less investment of private funds for Jones Act ships, the more pressures will there be for the waiving of restrictions on CDS-built ships so as to obtain tonnage for use in the domestic trades. More waivers will lead to an even greater unwillingness on the part of private investors to build without CDS. The end result, of course, is increased pressure on the Government for more CDS if vessels are to be built in U.S. yards. Thus this agency action, which was designed to bail out petitioner Seatrain and to save the Economic Development Administration and the Maritime Administration from the embarrassing possibility of defaults on guaranteed loans, threatens to defeat one of the basic purposes of the maritime laws, which is the promotion of a privately-financed, adequate Jones Act fleet.

Upon analysis, the theory urged here by petitioners is that there should be *no* separation of the Jones Act and subsidized fleets. While petitioners might try to limit their position to allowance of subsidized entry into the domestic fleet only before a vessel has started on its foreign life, the construction of the Merchant Marine Act which they urge supports no such limitation. If, as petitioners claim, Congress intended all along to allow subsidized ships to enter

Jones Act trades upon repayment of unamortized subsidy, that switch can be made at any time while the vessel is in service, at the discretion of the Secretary. Moreover, if the only statutory limitation, section 506, is "neutral" as to the duration of time a vessel may ply the domestic trades so long as a vessel "no longer retains the benefits of a CDS" (Government Brief, p. 53), then that vessel by disgorging (or promising to disgorge) unamortized subsidy may go in and out of the domestic trades for any periods of time, depending upon the Secretary's perceived need to protect Government guarantees of loans repayable over the life of the vessel. Furthermore, if section 506 is "neutral" on all of these issues, and if the power to amend subsidy contracts is within the broad contractual powers of the Secretary as urged here, there is nothing to prohibit the Secretary from canceling the commitment to pay back subsidy when the market once again favors foreign, rather than domestic, trade. Thus section 506 becomes "inoperative" under petitioners theory, and any separation of the Jones Act and subsidized fleets is totally within the vast realm of Secretarial discretion, unhampered by legislative guidelines which have been read out of the statute.

The issue of the proper bounds of separation of the Jones Act and the subsidized fleets is a matter of life and death to petitioners ABC and Trinidad. ABC, Trinidad, and the rest of the Jones Act fleet, do not have the "flexibility" which petitioners find "implicit" in the statute because they cannot enter the foreign trades when market vicissitudes favor the foreign market: they are permanently cost-barred. If Congress wrongly drew the line of demarcation between the Jones Act fleet and the subsidized fleet in section 506, then Congress should redelineate it after consideration of the views of all industrial segments.

Unhampered by the pressure of having committed itself to a single, massive, unviable venture into the supertanker market, Congress, but not the agency, can fairly evaluate the needs of all segments of the industry for both encouragement and protection.

If a defense of congressional rather than administrative prerogatives were needed in this area — which it is not — the facts and circumstances of this case provide that defense. What were the reasons given for the agency action taken here? Not, as now urged, the preservation of competition, the abolition of monopoly, the energy needs of the nation, all *post hoc* and flawed rationalizations; the reasons originally given remain the real reasons: to “improve the collateral position and prevent possible default on various obligations insured and guaranteed by the Department of Commerce” and to avoid “jeopardiz[ing] continued operation of the Seatrain Shipbuilding Corporation” (A. 66). Before committing itself on these loan obligations, each agency of the Department of Commerce was required by statute to satisfy itself that the proposed operations in foreign commerce were financially sound.⁹² They made a mistake, and their earlier evaluations of the Seatrain proposals (*supra*, pp. 7-10) show that all of the information and analytic tools to correctly evaluate the financial improbability of success were at their disposal. The Government’s knee-jerk position of defending past errors by administrative encroachment into legislative prerogatives proves again the need for a judiciary capable of setting metes and bounds.

As is often the case, the attempted “bail out” for which deference to administrative power is so earnestly sought provides as little evidence of sound economic decision

⁹²See *supra*, 12 & n. 8.

making as did the original Government commitments. What is the assurance that, even with this “waiver,” the Government will not be required to make good on its \$100 million of guarantees? Surely it cannot be a three-year charter of the vessel to Sohio, because the loan obligation must be paid over 20 years, and the ship must be profitable during at least the major portion of that time to avoid the spectre of default which now so horrifies the Government. The Government cannot claim that a domestic market is assured for 20 years because the Secretary of Commerce, in deciding that the effect on competition of waiving the STUYVESANT into the Alaskan oil trade is “none or minimal” (A. 598) limited that finding to a market analysis of three years, the Secretary disclaiming power to see further into the future than that (A. 584; *see also* opinion of the court below, Pet. App. 17a-18a & n. 34). Thus if the STUYVESANT finds no employment in a few years time, the objectives for which the Government begged judicial deference will go for naught. The effects, however, of such a decision will be felt and suffered by ABC, Trinidad and the Jones Act fleet for many years to come.

Petitioners are not content to rest their “purposes and policies” argument on the two reasons given by the agency for waiving the STUYVESANT into the Alaskan oil trade. They seek to offer this Court a broader perspective, invoking such catechisms as fair competition; avoidance of monopoly; national needs for energy (Seatrain Brief, pp. 67-72, 74-75; Government Brief, pp. 73-75). But the claims that only waiver of the subsidized fleet into the Jones Act fleet at the discretion of the Secretary will avoid monopoly, enhance fair competition, and satisfy the nation’s energy needs are transparently wrong. There never has been a suggestion that the Alaskan oil trade is a monopoly trade; the Secretary’s own decision on remand belies that statement (A. 582-583). The claim that “fair

competition" is enhanced by allowing CDS-built vessels which have repaid their subsidy to enter the domestic trades is contradicted by the Government's own example (Government Brief, p. 52 n. 56) showing that a prorata repayment of subsidy commensurate with the time a vessel serves the domestic trade does not equalize the position of subsidized and unsubsidized ships. It is further contradicted by the basic economic fact that it is *always* better to pay later, rather than earlier, *and especially in a period of (1) drastic increases in construction costs; and (2) severe inflation resulting in ever-increasing interest rates.* The notion that a mere repayment of subsidy five years later, or, in the present case, from five to twenty-five years later, places the subsidized and Jones Act fleets in a fair competitive relationship was questioned by none other than the present Maritime Administrator who said that "the owners of Jones Act ships, who have undertaken significant investment risks to assure the availability of shipping to meet U.S. domestic needs, deserve the strongest possible protection against any influx of ships *built for the foreign trade with the advantage of construction subsidy*" (see *supra*, p. 86). Finally, the notion that the waiver here promotes "fair competition" because based upon "the full disgorgement of the subsidy" (Seatrain Brief, p. 68) is contradicted by the fact that there has been no full disgorgement of the subsidy and there will not be for 20 years.

Petitioners' claim that the Jones Act fleet needs to be supplemented by the subsidized fleet to contribute towards the nation's energy crisis is patently an argument that is properly addressed to the legislature, not the judiciary. The vicissitudes of Alaskan oil output are not a matter of record here and were not initially urged below as reasons for granting the waiver since no such consideration had been made before granting the waiver. Petitioners' reliance

(Seatrain Brief, p. 71; Government Brief, p. 73) on the findings in the Secretary's decision on remand (A. 566-599) for support for the "energy crisis" argument is ill-founded, as shown by a study published by this same agency, four months after the decision on remand was issued, *changing* its conclusions respecting the previously-alleged deficit of unsubsidized tonnage necessary for the carriage of Alaskan oil.⁹³ According to the Secretary's forecast in the remand decision, there would be a *short term* deficit in the supply of tankers for the Alaska oil trade *through* the first quarter 1980 (A. 582-583), but the Secretary said that it was "difficult or impossible" to predict the supply and demand of tankers in the Alaska oil trade beyond 1980 (A. 584), when the present time charter of the STUYVESANT expires. The Secretary never attempted in the remand decision to show a need for additional tonnage beyond the first quarter of 1980.

In the May 3, 1978 study, however, the agency explained that the assessment undertaken in 1976 (on which the Secretary relied in making her remand decision) must be revised. This new assessment was needed because of "[s]ignificant changes since the completion of prior studies."⁹⁴ This more recent study shows a deficit of unsubsidized tankers *until* the first quarter of 1980. After that the study shows that there will be a *surplus* of unsubsidized tankers, and after 1980, the supply of unsubsidized tankers will be 160% of demand for tankers to carry oil in the Alaskan trade for the period 1980-1982-4.⁹⁵

⁹³Assessment of Alaskan Crude Oil Distribution, Maritime Administration, Department of Commerce, May 3, 1978 (hereafter, "MarAd Study of May 3, 1978").

⁹⁴MarAd Study of May 3, 1978, *supra*, at 2.

⁹⁵*Id.* at 21 Table 5.

Perhaps the most novel purpose and policy argument concocted after the fact by petitioners is the suggestion (Government Brief, p. 72) that "the decision below will undoubtedly diminish the attractiveness of the CDS program" ⁹⁶ One would have assumed from that argument that an important attraction of CDS, relied on by its recipients, was the possibility of switching from the foreign to the domestic market with no statutory or contractual inhibitions. But since no other subsidy recipient (with the single Grace Line exception) ever made the switch, it is hard to see why the CDS program should suddenly lose its appeal. Moreover, since the standard CDS contract prohibits the switch, a party applying for subsidy after the decision below was rendered could hardly be worse off than a party who had applied before. Finally, the Government earlier advised (Government Brief, pp. 54-55 & n. 60) that one *should* not, and petitioners did not (*but see supra*, pp. 6-10), participate in the CDS program on the assumption of obtaining a permanent release in the future. Indeed, the Government represented that participation on that assumption would be a "substantial factor" to be weighed by the Secretary in deciding upon the waiver — presumably a negative factor (pp. 54-55 & n. 60).

Petitioners should make up their mind whether CDS was meant to attract investment for foreign trade, or investment for domestic trade; the statute might aid in that determination. The statute says that the CDS program is designed to aid in the construction of vessels for U.S. foreign trade. Neither the objectives of promoting the statutory purposes nor the necessities of preserving the

⁹⁶The Government explains (Government Brief, p. 72 n. 76) "The distinct possibility, in light of the court of appeals' ruling, that a vessel, once subsidized, will be denied available employment in the domestic trade and will be forced to default on its loans necessarily lessens the appeal of the CDS program."

proper division of powers between the executive and the legislative branches are furthered by allowing the Secretary to accomplish what Congress has refused to permit: the subsidization from public funds of vessels to serve the domestic trades which are immune from foreign competition. The predicaments in which Seatrain and the Government have placed themselves should not obscure these more important long-range goals.

CONCLUSION

For all of the foregoing reasons, this Court should sustain the decision of the court of appeals.

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APPENDIX**STATUTES INVOLVED**

The following relevant statutes are set out in pertinent part, in addition to the statutes and rule reprinted in the appendices of the brief for the petitioners and the brief for the federal parties.

**Declaratory Judgment Act,
28 U.S.C. § 2201:**

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

**Merchant Marine Act, 1936, As Amended,
46 U.S.C. § 1159 (section 509):**

Any citizen of the United States may make application to the Secretary of Commerce for aid in the construction of a new vessel to be operated in the foreign or domestic trade (excepting vessels engaged solely in the transportation of property on inland rivers and canals exclusively). If such application is approved by the Secretary of Commerce, the vessel may be constructed under the terms and conditions of this subchapter, but no construction-differential subsidy shall be allowed. The Secretary of Commerce shall pay for the cost of national-defense features incorporated in such vessel. In case the vessel is designed to be of not less than three thousand five hun-

dred gross tons and and to be capable of sustained speed of not less than fourteen knots, or in the case of a passenger vessel operating solely on the inland rivers and waterways which is designed to be of not less than one thousand gross tons and to be capable of sustained speed of not less than eight knots, or in the case of an oceangoing tug of more than two thousand five hundred horsepower or oceangoing barge of more than two thousand five hundred gross tons, or in the case of a vessel of more than two thousand five hundred horsepower designed to be capable of sustained speed of not less than forty knots, the purchaser shall be required to pay the Secretary of Commerce not less than 12½ per centum of the cost of such vessel, and in the case of any other vessel the purchaser shall be required to pay the Secretary of Commerce not less than 25 per centum of the cost of such vessel (excluding from such cost, in either case, the cost of national defense features); and the balance of such purchase price shall be paid by the purchaser within twenty-five years in not to exceed twenty-five equal annual installments, with interest at a rate not less than (i) a rate determined by the Secretary of the Treasury, taking into consideration the current average market yield on outstanding marketable obligations of the United States with remaining periods to maturity comparable to the average maturities of such loans, adjusted to the nearest one-eighth of 1 per centum, plus (ii) an allowance adequate in the judgment of the Secretary of Commerce to cover administrative costs, the balance of such purchase price being secured by a preferred mortgage on the vessel sold and otherwise secured as the Secretary of Commerce may determine: *Provided*, That, notwithstanding any other provisions of law, the balance of the purchase price of a passenger vessel constructed under this section which is delivered subsequent to March 8, 1946, and which has the tonnage, speed,

passenger accommodations, and other characteristics set forth in section 1153 of this title, may, with the approval of the Secretary of Commerce, be secured as provided in such section, and the obligation of the purchaser of such a vessel shall be satisfied and discharged as provided in such section.

**Merchant Marine Act, 1936, As Amended,
46 U.S.C. § 1244(a) (section 905(a)):**

When used in this chapter —

(a) The words "foreign commerce" or "foreign trade" mean commerce or trade between the United States, its Territories or possessions, or the District of Columbia, and a foreign country, except that in the context of section 1177 of this title concerning capital construction funds and in the context of subchapter V of this chapter concerning construction-differential subsidy, the said words "foreign commerce" or "foreign trade" shall also include, in the case of liquid and dry bulk cargo carrying services, trading between foreign ports in accordance with normal commercial bulk shipping practices in such manner as will permit U.S.-flag bulk vessels freely to compete with foreign-flag bulk carrying vessels in their operation or in competing for charters, subject to rules and regulations promulgated by the Secretary of Commerce pursuant to section 1114(b) of this title.

**Merchant Marine Act, 1936, As Amended,
46 U.S.C. § 1274(d) (section 1104(d)):**

(d) No commitment to guarantee an obligation shall be made by the Secretary of Commerce unless he finds, at or prior to the time such commitment is made, that the property or project with respect to which the obligation will be executed will be, in his opinion, economically sound

and in the case of fishing vessels, that the purpose of the financing or refinancing is consistent with the wise use of the fisheries resources and with the development, advancement, management, conservation, and protection of the fisheries resources, and no obligation, unless made pursuant to a prior commitment, shall be guaranteed unless the Secretary of Commerce finds, at or prior to the time the guarantee becomes effective, that the property or project with respect to which the obligation is executed will be, in his opinion, economically sound and in the case of fishing vessels, that the purpose of the financing or refinancing is consistent with the wise use of the fisheries resources and with the development, advancement, management, conservation, and protection of the fisheries resources.

**Relief Act of 1940,
46 U.S.C. § 1242a:**

(a) When used in this section the term 'essential vessel' means any vessel (1) which is (A) security for any mortgage indebtedness to the United States or (B) constructed under this chapter, or required by the terms of a contract under this chapter to be operated on a certain essential foreign trade route, and (2) which it is necessary in the interests of commerce and national defense to maintain in condition for prompt use.

(b) For the purposes of preserving in the national interest the full availability and usefulness of essential vessels, which, under the provisions of the Neutrality Act of 1939 (or any proclamation issued thereunder), or compatibly with the national interest, cannot be operated in the service, route, or line to which such vessels are assigned pursuant to this chapter, or in which they would otherwise be operated, the Secretary of Commerce is authorized to make adjustments of obligations in respect to such

vessels and to make arrangements for the maintenance of such vessels, subject to the provisions of this section and to such rules and regulations as the Secretary shall prescribe as necessary or appropriate for carrying out the purposes and provisions of this section. If the Secretary, upon written application in respect of any essential vessel, determines after such examination, investigation, and proceedings as he deems desirable, that (1) the operation of such vessel in the service, route, or line to which such vessel is assigned pursuant to this chapter, or in which it would otherwise be operated, is either (A) not lawful under the Neutrality Act of 1939 (or any proclamation issued thereunder), or (B) not compatible with the maintenance of availability of such vessel for purposes of national defense and commerce, (2) it is not feasible under existing law to employ such vessel in any other service or operation in either the foreign or domestic trades (except temporary or emergency operation under subsection (c)(5) hereof), and (3) the applicant, by reason of the restrictions of the Neutrality Act of 1939, or the withdrawal of vessels for national-defense purposes under clause (1) hereof, is not earning or will not earn a fair and reasonable return on the capital necessarily employed in its business, the Secretary may make adjustments and arrangements with the applicant as provided in subsection (c) of this section, which shall continue in effect only during the circumstances above described.

(c) Such adjustments and arrangements shall include suspension of the requirement to operate such differential or construction-differential subsidy contract or mortgage or other agreement, and of the right to operating-differential subsidy in respect of such vessel. . .

**Merchant Ship Sales Act of 1946,
§ 9(d), 50 U.S.C. App. § 1742(d), repealed,
Pub. L. 94-412, 90 Stat. 1258 (1976)**

(d) Section 506 of the Merchant Marine Act, 1936, as amended [section 1156 of Title 46], shall not apply with respect to (1) any vessel which is eligible for an adjustment under this section, or (2) any vessel described in clauses (1)-(3), or (4) of subsection (a) of this section, the contract for the construction of which is made after September 2, 1945, and prior to the date of enactment of this Act.